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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 352

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 26, 1937

CERTIORARI GRANTED OCTOBER 11, 1937

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TRANSCRIPT OF RECORD

United States Circuit Court of Appeals

FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
a Corporation,

Appellee.

Appeal from the United States District Court, Eastern District of Louisiana, returnable on or before February 26, 1937, at the City of New Orleans, Louisiana.

United States District Court,
Eastern District of Louisiana,
New Orleans Division.

UNITED STATES OF AMERICA

versus No. 232 (Law).

ILLINOIS CENTRAL RAILROAD COMPANY,
A Corporation.

Appearances:

Rene A. Viosca, Esq., United States Attorney; Robert Weinstein, Esq., Assistant United States Attorney; Of Counsel for United States of America Appellant;

Messrs. Lemle, Moreno & Lemle, (Arthur A. Moreno, Esq.) Of Counsel for Illinois Central Railroad Company, Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana to the United States Circuit Court of Appeals for the Fifth Circuit, returnable on or before February 26th, 1937, at the City of New Orleans, Louisiana.

TRANSCRIPT OF RECORD.

2 PETITION

Filed March 22nd, 1933.
In the District Court of the United States
Eastern District of Louisiana.

No. 232—Law (D. of A. No. 19937).

United States of America

vs. 232 Law

Illinois Central Railroad Company, a corporation.

The United States of America, plaintiffs, by Edmond E. Talbot, their attorney in and for the Eastern District

of Louisiana, complain of the defendant, the Illinois Central Railroad Company, and state:

That heretofore, to-wit, on Oct. 8, 1932, and before and ever since said date said defendant was a corporation organized and existing under the laws of the State of Illinois and carried on its business in the Eastern District of Louisiana, and was at said times and is now a railroad company within the United States of America and owned and operated a railroad which formed a part of a line of road over which cattle, sheep, swine, and other animals are conveyed from one State to another, to-wit, from the State of Mississippi into the State of Louisiana, and over which said line of road the cattle hereinafter mentioned were conveyed from the State of Mississippi into another State, to-wit, Louisiana, and which railroad as aforesaid owned and operated by the defendant extends in part from New Orleans, Louisiana, to Jackson, Mississippi; and the Yazoo & Mississippi Valley Railroad Company then and there owned and operated another railroad which said railroad so owned and operated by the said Yazoo & Mississippi Valley Railroad Company connected with the said road of the defendant at Jackson, Mississippi, and extended from said Jackson to Hermanville, Mississippi.

B.A.I. No. 25470

And on October 8, 1932, at 3:00 o'clock in the afternoon the said Yazoo & Mississippi Valley Railroad Company at Hermanville Station aforesaid received from F. R. Sawyer, the owner thereof, a certain number of cattle, to-wit, 61 calves, consigned to W. H. Hodges & Company, New Orleans, Louisiana; and the owner of said cattle did then and there duly request in writing that the period of confinement of said cattle be extended to 36 hours.

And thereupon the said Yazoo & Mississippi Valley Railroad Company did then and there confine the said cattle in a car marked IC-31505, and conveyed the said cattle over the railroad of the said Yazoo & Mississippi Valley Railroad Company to Jackson Station aforesaid without unloading said cattle, and at 8:15 o'clock in the evening of October 8, 1932, there delivered said cattle to the defendant, which said defendant did then and there further confine said cattle in said car and did convey the said cattle over its line of road to New Orleans Station aforesaid where they were unloaded, the unloading thereof beginning at 4:00 o'clock in the afternoon of October 10, 1932.

And said defendant within the jurisdiction of this Court did knowingly and willfully confine said cattle in the aforesaid railroad car for a period of more than 36 consecutive hours, to-wit, for 37 hours, without unloading said cattle for any period of rest, water, and feeding, said period of 37 hours including the period said cattle were confined on the road of said Yazoo & Mississippi Valley Railroad Company without said cattle having been unloaded as aforesaid.

3

And said defendant was not prevented from unloading said cattle by storm or other accidental or unavoidable causes which could not have been anticipated or avoided by the exercise of due diligence and foresight.

Whereby and by virtue of an Act of Congress entitled "An Act to Prevent Cruelty to Animals While in Transit by Railroad or other Means of transportation from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia" (34 Statutes at Large, 607), an action hath accrued to the plaintiffs and said defendant hath forfeited and become liable to pay to the plaintiffs a penalty of

not less than one hundred dollars and not more than five hundred Dollars for the aforesaid confinement of said cattle.

Wherefore the plaintiffs pray judgment for five hundred dollars and for their costs herein expended and for all proper relief.

(Sgd) E. E. TALBOT
United States Attorney for the
Eastern District of Louisiana.

4

ANSWER

Filed May 22, 1933.

In the District Court of the United States
Eastern District of Louisiana

Unted States of America

vs. No. 232 At Law
(D. of A. No. 19937)

Illinois Central Railroad Company, a Corporation

Now into Court, through undersigned attorneys, comes the Illinois Central Railroad Company, made defendant herein, and in answer to the petition of the United States of America denies generally and singularly each and every allegation herein contained, except such as may be hereinafter admitted, and for further answer says:

I.

It admits the allegations of the first paragraph of the petition of the United States of America.

II.

It admits the allegations of the second paragraph of the petition of the United States of America.

III.

It admits the allegations of the third paragraph of the petition of the United States of America, except the allegation that the unloading of the cattle began at 4:00 o'clock in the afternoon of October 10, 1932, which allegation it denies, and defendant avers that the unloading began at 4:00 o'clock on the morning of October 10th, 1932.

IV.

It denies the allegations of the fourth paragraph of the petition of the United States of America, and specially denies that it did knowingly and wilfully confine the cattle for a period of more than thirty-six hours.

V.

It denies the allegations of the fifth paragraph of the petition of the United States of America.

VI.

It denies the allegation of the sixth paragraph of the petition of the United States of America and specially denies that it has forfeited or become liable to pay to the United States of America any sum whatsoever.

5

VII.

Further answering, defendant avers that I. C. Car No. 31505 was loaded with cattle at Hermanville, Missis-

sippi, at 3:00 o'clock in the afternoon of October 8th, 1932, and shipped to New Orleans, Louisiana, with a thirty-six hour release signed by the shipper. This car arrived at Stuyvesant Docks Yards at or about 11:35 P. M. on October 9th, 1932, with two other cars of cattle. Defendant's Night General Yardmaster received advance information from the defendant's train dispatcher at McComb, Mississippi, of the approximate time of arrival of these three cars and when the period of rest for the cattle was up, and because of the necessity of prompt handling of the said cattle and the improbability of handling it on regular trains, an extra engine and crew were procured and were in waiting for the arrival of these cars of cattle, including I. C. Car No. 31505, and immediately switched said cars and placed them, including I. C. Car No. 31505, in the Crescent City Stock Yards, for delivery at 2:50 A. M. on October 10th, 1932, at which time the period allotted for the confinement of these cattle, to-wit, thirty-six hours, had not elapsed, and the said car was placed for unloading within said period of time. Through oversight the Night General Yardmaster negligently failed to notify the employee of the Illinois Central Railroad Company, whose duty it was to unload the car, that the cattle would be placed for delivery in the early hours of the morning, and because of said oversight and said negligent action of the Night General Yardmaster the said car was not unloaded until 4:00 A. M. on the morning of October 10th.

VIII.

Further answering, defendant avers that it did not knowingly and wilfully confine the said cattle in I. C. Car 31505 beyond the statutory period of thirty-six hours, but, on the contrary, took the greatest pains and went to extra expense to comply with the law and to unload the said cattle within the statutory period, but that

the confinment of the cattle beyond the statutory period was due to the oversight and to the negligent act of its Night General Yardmaster, as aforesaid:

Wherefore, defendant prays that plaintiff's petition be dismissed at its cost.

(Sgd) LEMLE MORENO & LEMLE
Attorneys for Illinois Central,
Defendant.

6 State of Louisiana:
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared SELIM B. LEMLE, who, being by me duly sworn, deposes and says:

That he is a member of the law firm of Lemle, Moreno & Lemle, attorneys for defendant herein; that the President, Vice-President and other managerial officers of the corporation are absent from the State of Louisiana, which is the reason why he makes this affidavit; that he is authorized so to do; that he has read the above and foregoing answer and all the allegations of fact therein contained are true and correct to the best of his knowledge, information and belief.

(Sgd) SELIM B. LEMLE

(Seal)

Sworn to and subscribed before me this 22nd day of May, 1933.

(Signed) LOUIS C. LEMLE,
Notary Public.

(Seal)

7 PLAINTIFF'S PETITION FOR JUDGMENT

Filed April 19, 1934.

In the District Court of the United States

Eastern District of Louisiana.

No. 232—Law (D. of A. No. 19937)

United States of America

vs.

Illinois Central Railroad Company, a Corporation.

On motion of Robert Weinstein, Assistant United States Attorney, attorney for the United States of America, the plaintiff in the above entitled and numbered cause, and on suggesting to the Court that, on the allegations contained in plaintiff's petition herein, and the admissions contained in the defendant's answer, plaintiff is entitled to a judgment as prayed for, and that judgment should be rendered accordingly;

It is ordered by the Court that the Illinois Central railroad Company, a corporation, defendant in the above entitled and numbered suit, do show cause on the 25th day of April, 1934, at 10:00 A. M., why judgment should not be rendered in this cause in favor of plaintiff and against said defendant as prayed for in plaintiff's petition.

(Sgd.) WAYNE G. BORAH,
Judge.

April 19, 1934.

8 EXTRACT FORM THE MINUTES
May Term, 1935.

Order overruling motion of United States of America for judgment and reserving to United States bill of exceptions to the ruling of the Court.

New Orleans, Thursday, June 27th, 1935.
Court met pursuant to adjournment,
Present: Hon. Wayne G. Borah, Judge,
Hon. John McDuffie, Judge.

Proceedings before the Honorable John McDuffie, District Judge.

No. 232 (Law)

United States of America

vs

Illinois Central Railroad Company

This cause came on at a former day on the motion for Judgment filed by the United States of America, herein, and was argued by counsel for the respective parties and submitted when the Court took time to consider.

Whereupon, and on due consideration thereof,

It is ordered by the Court, that the motion for Judgment filed by the United States of America herein, be and the same is hereby overruled, counsel for the United States of America reserving a bill of exception to the ruling of the Court.

9 STIPULATION OF FACTS AND WAIVING TRIAL BY JURY

Filed Jan. 22, 1936.

In the District Court of the United States in and for the Eastern District of Louisiana, New Orleans Division

United States of America

vs. No. 232—Law
D. of A. No. 19937

Illinois Central Railroad Company, a Corporation

STIPULATION OF FACTS AND WAIVING TRIAL BY JURY

It is stipulated and agreed that a trial by jury be waived in the above entitled and numbered cause, and that it shall be tried before the United States District Court, without the aid or intervention of a jury. It is further stipulated that the parties herein agree that for the purpose of the trial and final hearing of this case, the following facts are true:

I.

On October 8, 1932, and before and ever since that date, the defendant, Illinois Central Railroad Company, a corporation, was organized and existing under the laws of the State of Illinois and carried on business in the Eastern District of Louisiana, and was at said time and is now a railroad company within the United States of America, and owned and operated a railroad which formed a part of a line of roads over which cattle, sheep,

swine and other animals are conveyed from one state to another, to-wit, from the State of Mississippi, into the State of Louisiana, and over which said line of road, the cattle hereinafter mentioned were conveyed from the State of Mississippi into another State, to-wit, Louisiana, and which said railroad as aforesaid owned and operated by the defendant extends in part from New Orleans, Louisiana, to Jackson, Mississippi; and The Yazoo & Mississippi Valley Railroad Company, then and there owned and operated another railroad, which said railroad company owned and operated by the said The Yazoo & Mississippi Valley Railroad Company connected with the said road of the defendant at Jackson in the State of Mississippi and extended from said Jackson to Hermanville, Mississippi.

II.

On October 8, 1932, at 3:00 o'clock in the afternoon, the said The Yazoo & Mississippi Valley Railroad Company, at Hermanville Station aforesaid, received from F. R. Sawer, the owner thereof, a certain number of cattle, to-wit, sixty-one (61) calves, consigned to W. H. Hodges & Company, New Orleans, Louisiana; and the owner of said cattle did then and there duly request in writing that the period of confinment of said cattle be extended to thirty-six (36) hours.

III.

Thereupon the said The Yazoo & Mississippi Valley Railroad Company did then and there confine the said cattle in a car marked IC-31505, and conveyed the said cattle over the railroad of the said The Yazoo & Mississippi Valley Railroad Company to Jackson Station aforesaid, without unloading said cattle and at 8:15 o'clock in the evening of October 8, 1932, they delivered said

cattle to the defendant, which said defendant did then and there further confine said cattle in said car and did convey the said cattle over its line or road to New Orleans Station aforesaid, where they were unloaded, the unloading thereof beginning at 4:00 o'clock in the morning of October 10, 1932.

IV.

The said defendant within the jurisdiction of this Court did confine the said cattle in the aforesaid railroad car for a period of more than thirty-six (36) consecutive hours, to-wit, for thirty-seven (37) hours, without unloading said cattle for a period of rest, water and feeding, the said period of thirty-seven (37) hours including the period said cattle were confined on the road of the said The Yazoo & Mississippi Valley Railroad Company, without said cattle having been unloaded as aforesaid.

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V.

Said defendant was not prevented from unloading said cattle by storm or other unavoidable cause, but did not unload said cattle within the statutory period for the reasons set out in the following article hereof.

VI.

The aforesaid car IC-31505 was loaded with cattle at Hermanville, Mississippi, at 3:00 o'clock in the afternoon of October 8, 1932, and shipped to New Orleans, Louisiana, with a thirty-six (36) hour release signed by the shipper. This car arrived at the Styvesant Stock Yards at 11:35 P. M. on October 9, 1932 with two other cars of cattle. Defendant's Night General Yardmaster received advance information from the defendant's dis-

patcher at McComb of the approximate time of the arrival of these three cars and when the period of rest for the cattle was up, and because of the necessity of prompt handling of the said cattle and the improbability of handling it on regular trains, an extra engine and crew were procured and were in waiting for the arrival of these cars of cattle, including IC-31505, and immediately switched said cars and placed them, including IC car 31505 in the Crescent City Stock Yards for delivery at 2:50 A. M. on October 10, 1932, at which time the period allowed for the confinment of these said cattle, to-wit, thirty-six (36) hours had not elapsed, and the said car was placed for unloading within said period of time.

VII.

The Night General Yardmaster, knowing how long the cattle had already been confined, failed to notify the employee of the Illinois Central Railroad, whose duty it was to unload the car, that the cattle car was to be placed for delivery in the early hours of the morning and because of this failure of the Night General Yardmaster, the said car was not unloaded until 4:00 o'clock A. M. on the morning of October 10, 1932. It was the duty of the Night General Yardmaster under the instructions of the Illinois Central Railroad Company to notify the employee of the Illinois Central Railroad Company as to when the cars would be placed for delivery. The Night General Yardmaster is now dead.

The parties herein reserve the right to introduce in evidence at the trial of this cause, other facts which are not inconsistent with the stipulations herein entered into.

By agreeing to the statements contained in the above stipulations, the parties herein are not agreeing as to

any legal rights resulting therefrom and particularly are not agreeing as to whether or not, under the above stipulations said cattle were knowingly and wilfully confined for more than thirty-six hours, but said legal rights are to be determined by the facts set forth in these stipulations and any evidence introduced on the trial of this cause.

(Sgd LEMLE, MORENO & LEMLE
Counsel for Defendant

(Sgd) ROBERT WEINSTEIN
Assistant U. S. Attorney,
Counsel for United States of America.

11 MOTION FOR JUDGMENT IN FAVOR OF UNITED STATES OF AMERICA,

Filed Jan. 22, 1936.

In the District Court of the United States
For the Eastern District of Louisiana
New Orleans Division

United States of America

vs. No. 232—Law
D. of A. No. 19937

Illinois Central Railroad Company, a Corporation

MOTION FOR JUDGMENT IN FAVOR OF THE UNITED STATES OF AMERICA

Now comes the United States of America, plaintiff in the above entitled and numbered cause, appearing through Robert Weinstein, Assistant United States At-

torney, its undersigned counsel, and moves this Honorable Court for a judgment in favor of the United States of America as prayed for in the above entited and numbered cause, together with interest and costs, on the grounds that the facts and the law are in favor of the United States of America and entitle the United States of America to judgment as prayed for.

(Sgd) ROBERT WEINSTEIN
Assistant United States Attorney.

12 MOTION FOR JUDGMENT IN FAVOR OF DEFENDANT

Filed Jan. 22, 1936.

United States District Court
Eastern District of Louisiana
New Orleans Division

United States of America

vs. No. 232, at Law
D. of A. No. 19937

Illinois Central Railroad Company, a Corporation

Now comes Illinois Central Railroad Company, made defendant herein, and at the close of all of the evidence

(1) Moves the court to find a judgment in favor of the Illinois Central Railroad Company on all the evidence and on the law.

(2) In the alternative only, and in the event that the court should not find a judgment in favor of the Illinois Central Railroad Company, defendant, and re-

serving the right in that event to except to the refusal so to do, and to reserve a bill of exceptions thereto, to which said bill of exceptions shall be annexed all of the evidence, both oral and written in this cause, the defendant, Illinois Central Railroad Company requests the court to charge itself as follows:

(a) That before the Illinois Central Railroad Company, defendant, can be found liable herein, it must appear that the failure to unload the cattle within the statutory period was knowing and wilful.

(b) That there is no evidence before the court that the failure to unload the cattle within the statutory period was knowing and wilful, but that said failure was due to ordinary negligence on the part of an employee of the Illinois Central Railroad Company.

(c) That the negligent failure of an employee of the Illinois Central Railroad Company to cause the cattle to be unloaded within the statutory period will not render the Illinois Central Railroad Company liable for any penalty herein.

Further, as a part of said alternative request Illinois Central Railroad Company moves the court to make a general finding in its favor and to make the following special findings of law and fact:

(a) That the Illinois Central Railroad Company, defendant, attempted in good faith to comply with the statutory requirement to unload the cattle within the statutory period.

13 (b) That the failure of the Illinois Central Railroad Company to unload the cattle during the statutory period was not knowing and wilful.

(c) That the failure of the Illinois Central Railroad Company to unload the cattle during the statutory period was due to the negligent oversight of the night yardmaster employed by the said defendant in failing to notify an employee of the Illinois Central Railroad Company to unload the said car of cattle within the statutory period after the said night yardmaster had caused the said cattle to be transported to destination by a special train in a bona fide attempt to observe the said statutory requirement to unload the cattle within thirty-six hours.

(Sgd) LEMLE, MORENO & LEMLE
Attorneys for Illinois Central
Railroad Company

14 REQUEST OF UNITED STATES OF AMERICA FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW,

Filed January 22, 1936.

In the District Court of the United States
For the Eastern District of Louisiana
New Orleans Division

United States of America

vs. Docket No. 232—Law
D. of A. No. 19937.

Illinois Central Railroad Company, a Corporation.

PLAINTIFF'S PETITION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Plaintiff, upon the pleadings and the stipulation filed herein, respectfully requests the Court to make findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. All of the facts set forth in the stipulated statement of facts which stipulation is attached hereto and made a part hereof.

2. The defendant, Illinois Central Railroad Company, under the facts set forth in the stipulation which has been attached hereto and made a part hereof, "knowingly and wilfully" failed to unload the animals within the statutory time, within the meaning of Sections 71, 73 and 74 of Title 45 United States Code.

3. There is no evidence before the Court to show that the failure to unload the animals within the statutory time limit was due to a cause other than its knowing and wilful conduct, within the meaning and intent of Sections 71 and 75 of Title 45 United States Code.

CONCLUSIONS OF LAW

1. The Cruelty to Animals Act of June 29, 1906, Chapter 3594, (Title 45 USC Sections 71, 73 and 74) is a civil statute and a remedial one. One purpose of the statute is to prevent the slaughtering of animals for food when in a feverish condition brought about by long confinement without food, water and rest. The main purpose is to prevent cruelty to animals shipped. Accordingly, it should be liberally construed so as to effectuate its purpose.

15 2. The failure of an employee of the defendant railroad company to unload the animals within the statutory period, after a full knowledge of the facts as set forth in paragraphs six and seven of the stipulated facts, was negligence and that negligence was constructively the negligence of the corporation, Illinois Central Railroad Company.

3. The defendant, Illinois Central Railroad Company, a Corporation, could, of course, only act through agents, and its answer expressly alleges that "through oversight the Night General Yardmaster negligently failed to notify the employee of the Illinois Central Railroad Company, whose duty it was to unload the car, that the cattle would be placed for delivery in the early hours of the morning, and because of said oversight and said negligent action of the Night General Yardmaster the said car was not unloaded until 4:00 A. M. on the morning of October 10th." The facts expressly alleged in the answer negative the claim that the failure to rest, feed and water was not the result of knowledge and wilfulness on the part of the company. It knew through its agents, and through them only could know, that the cattle were loaded on its cars, when their transportation commenced, where it should rest, water, and feed them as required by the statute, instead of doing which, it, through its agents, continued to hold them in its cars longer than the statutory period without rest, feed, or water. When the company did this, according to its own averments, by and through the only means it transported or could transport them at all, namely, its agents, it did so "knowingly and wilfully," within the meaning of the Cruelty to Animals Act.

4. In order for the Court to find a violation of the Cruelty to Animals Act, it is only necessary to find that the defendant "knowingly and wilfully" failed to comply with the law, notwithstanding the fact that there may have been no evil motive or intent in the transaction.

5. Oversight and forgetfullness do not excuse the overconfinement of animals under the Cruelty to Animals Act.

6. Section 71 of Title 45 United States Code sets forth a proviso which releases a carrier from liability when there has been an overconfinement of animals when "prevented by storm or other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight." Since the carrier seeking to avail itself of the defense afforded by the proviso must prove its diligence, it cannot be said that by merely denying that it "knowingly and wilfully" failed to unload the animals, it may escape the statutory penalty by proving negligence.

16

7. Sections 71 and 73 of Title 45 United States Code should be read in pari materia, in an action for a penalty as provided in Section 73. In other words, in order to determine whether an action of a carrier has been "knowingly and wilfully" committed as set forth in Section 75, the language of Section 71 of the Act should be considered.

8. A negligent failure to comply with the law, with a full knowledge of facts as set forth in the stipulation, is a knowing and wilful failure within the meaning of the Cruelty to Animals Act.

9. Under the undisputed facts of this case there has been a violation of the Cruelty to Animals Act by the Illinois Central Railroad Company, and the United States of America is entitled to judgment as prayed for.

Respectfully submitted,

(Sgd) HERBERT WEINSTEIN,
Assistant United States Attorney.

New Orleans, Louisiana,
January 22nd, 1936.

17 COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed Oct. 6, 1936.

In the District Court of the United States in and for the Eastern District of Louisiana
New Orleans Division

United States of America

vs. No. 232—Law
D. of A. No. 19937

Illinois Central Railroad Company, a Corporation

After due consideration of the pleadings filed herein by the respective parties and the stipulation, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. All of the facts set forth in the stipulated statement of facts, which stipulation is attached hereto and made a part hereof.

2. That the Illinois Central Railroad Company, defendant attempted in good faith to comply with the statutory requirement to unload the cattle within the statutory period.

3. That the failure of the Illinois Central Railroad Company to unload the cattle during the statutory period was not knowing and wilful.

4. That the failure of the Illinois Central Railroad Company to unload the cattle during the statutory pe-

riod was due to the negligent oversight of the night yardmaster employed by the said defendant in failing to notify an employee of the Illinois Central Railroad Company to unload the said car of cattle within the statutory period after the said night yardmaster had caused the said cattle to be transported to destination by a special train in a bona fide attempt to observe the said statutory requirement to unload the cattle within thirty-six hours, all as set forth specifically in paragraphs six and seven of the stipulated facts, which are attached hereto and made a part hereof.

5. The Court finds that the defendant, through its proper employee, knew how long the animals had been confined and as the train approached New Orleans it became apparent that it could not unload them within the time limit unless it had a special engine at its terminal there ready to move the car to the stockyards.

CONCLUSIONS OF LAW

The Court comes to the following conclusions of law, which conclusions have been applied to the facts, and upon which judgment was rendered in favor of the defendant:

1. The Court finds that Section 71 of Title 45 U. S. C. A. should not be read in pari materia with Section 73 of Title 45 U. S. C. A. in an action for a penalty as provided in the latter section. In other words, in order to determine whether an action of a carrier has been "knowingly and wilfully" committed under Section 73, the language set forth in Section 71 of the act should not be considered.

2. The Court finds that negligence of an employee of a carrier, while performing his regular duties is not

equivalent to knowledge and wilfulness as these words are used in Section 73, Title 45 U. S. C. A.

3. The Court finds that in order to render a carrier liable for the penalty provided by Section 73 of Title 45 U. S. C. A., the failure to comply with the statutory regulation for unloading, watering and feeding animals must be occasioned by the knowing and wilful act of a carrier, and negligent failure to comply with the statute would not render the carrier liable for the penalty.

18 4. From the facts stated under Findings of Fact, paragraph five, the Court concludes that the defendant in having the engine available did no more than it was required to do to meet its statutory obligation. The failure of a yardmaster to have an employee ready to unload the animals was negligence and that negligence was constructively the negligence of the corporation. The Court finds that although there was actual negligence as set forth in the conclusions of fact and the stipulation, there was no wilfulness and knowledge within the meaning of Section 73, Title 45 U. S. C. A.

(Sgd) WAYNE G. BORAH,
U. S. Dist. Judge.

19 ORDER DENYING MOTION OF UNITED STATES OF AMERICA FOR JUDGMENT AND FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RESERVING BILL OF ECEPTIONS TO RULING OF THE COURT.

EXTRACT FROM THE MINUTES,

May Term, 1936.

New Orleans, Tuesday, October 6, 1936.
Court met pursuant to adjournment;
Present: Hon. Wayne G. Borah, Judge.

No. 232 (Law)

United States of America

—versus—

Illinois Central Railroad Company,

In this matter, it is ordered by the Court that the motion of United States of America for Judgment be denied, and

It is further ordered that the request of the United States of America for findings of fact and conclusions of law be overruled, counsel for the United States reserving a Bill of exception to each of the above rulings of the Court.

20 ORDER OF COURT RESERVING TO UNITED STATES OF AMERICA BILL OF EXCEPTION TO CONCLUSIONS OF LAW AND FINDINGS OF FACT AND EACH OF THEM.

EXTRACT FROM THE MINUTES,

May Term, 1936.

New Orleans, Tuesday, October 6, 1936

Court met pursuant to adjournment,
Present: Hon. Wayne G. Borah, Judge.

No. 232 (Law)

United States of America

versus

Illinois Central Railroad Company,

On motion of United States of America, through Robert Weinstein, Assistant United States Attorney;

It is ordered by the Court that a bill of exception be allowed the United States of America to the Conclusions of Law, which the Court has stated and to the Findings of Fact and each of them.

21

JUDGMENT

Filed Oct. 6, 1936.

May Term, 1936—

New Orleans, Tuesday, October 6, 1936,

Court met pursuant to adjournment;
Present: Hon. Wayne G. Borah, Judge.

United States of America

No. 232 Law versus

Illinois Central Railroad Company (a corporation)

This cause came on at a former day to be heard before the Court without the intervention of a jury, trial by Jury having been waived by agreement of counsel in writing and on file in the record.

Whereupon, after hearing the pleadings and stipulations offered on behalf of the respective parties and the motion for judgment filed by the defendant, and the arguments of counsel for the respective parties, the matter was taken under advisement.

Whereupon and after due consideration thereof, and for the reasons orally assigned;

It is Ordered, Adjudged and Decreed that there be judgment in favor of the Illinois Central Railroad Company, a corporation, defendant, dismissing the suit of the United States of America.

Judgment rendered October 6, 1936.

Judgment signed November 19, 1936.

(Sgd) WAYNE G. BORAH,
Judge.

22 MOTION AND ORDER PRESERVING AND EXTENDING RIGHTS OF APPEAL ON BEHALF OF UNITED STATES OF AMERICA.

Filed November 25, 1936.

In the District Court of the United States
for the Eastern District of Louisiana
New Orleans Division

United States of America

vs. Docket No. 232—Law
D. of A. No. 19937.

Illinois Central Railroad Company, a Corporation.

MOTION AND ORDER PRESERVING AND EXTENDING RIGHTS OF APPEAL ON BEHALF OF THE UNITED STATES OF AMERICA

On motion of the United States of America, through Robert Weinstein, Assistant United States Attorney for the Eastern District of Louisiana, which hereby excepts to the Court's Judgment herein, reiterating the exceptions previously requested and allowed and gives defendant notice of its intention to appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and on suggesting to the Court that in order that the rights of said plaintiff may be properly preserved, it is desirable that an extension of thirty days time be allowed said plaintiff for the taking of all requisite steps looking toward the perfecting of an appeal herein;

It is ordered by the Court that all the rights of said plaintiff, the United States of America, be and they are

hereby preserved, and, accordingly, that the time allowed by law to said plaintiff for taking all requisite steps looking toward the perfecting of an appeal herein to the United States Circuit Court of Appeals for the Fifth Circuit, be and it is hereby extended for a period of thirty days.

New Orleans, Louisiana, this 25th day of November, 1936.

(Signed) WAYNE G. BORAH,
Judge.

23 PETITION OF U. S. OF AMERICA FOR APPEAL AND ORDER ALLOWING SAME.

Filed Jan. 27, 1937.

In the District Court of the United States
for the Eastern District of Louisiana
New Orleans Division

United States of America,
Plaintiff

vs. No. 232 Law

Illinois Central Railroad Company, a corporation
Defendant

PETITION FOR APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Wayne G. Borah, Judge of the United States District Court for the Eastern District of Louisiana:

The above named petitioner, United States of America, considering itself aggrieved by the judgment rendered on October 6, 1936 and signed on November 19, 1936, in the above entitled cause, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit under the rules of said Court in such cases made and provided.

New Orleans, Louisiana, this 27 day of January, 1937.

(Signed) RENE A. VIOSCA,
United States Attorney

(Signed) ROBERT WEINSTEIN,
Assistant United States Attorney
Attorneys for Petitioner, United
State of America

24 ORDER

Upon due consideration of the foregoing petition for appeal

It is ordered that the appeal herein be allowed as prayed for, and

It is further ordered that a certified transcript of the record of all proceedings be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit.

New Orleans, Louisiana, this 27 day of January, 1937.

(Signed) WAYNE G. BORAH,
United States Judge

25 ASSIGNMENT OF ERRORS

Filed Jan. 27, 1937.

In the District Court of the United States
for the Eastern District of Louisiana
New Orleans Division

United States of America,
Plaintiff

vs. No. 232 Law

Illinois Central Railroad Company, a corporation
Defendant

ASSIGNMENT OF ERRORS

Now comes the said United States of America, plaintiff in the above cause, and files the following Assignment of Errors, upon which it will rely in the prosecution of the appeal herein petitioned for in said cause, from the judgment of this Court rendered on the 6th day of October, 1936 and signed on the 19th day of November, 1936.

1.

The Court erred in overruling plaintiff's motion for judgment on the face of the pleadings and by deciding that from the facts of the pleadings as shown in the plaintiff's petition and the admissions contained in the defendant's answer, the Government was not entitled to judgment.

2.

The Court erred in sustaining the defendant's motion for judgment after the conclusion of the trial of the cause.

3.

The Court erred in overruling the plaintiff's motion for judgment at the conclusion of the trial of the cause.

4.

The Court erred in making the findings of fact and conclusions of law which it signed on October 6, 1936.

5.

The Court erred in failing to find the findings of fact and conclusions of law which were requested by the plaintiff, United States of America.

6.

The Court erred in rendering judgment in favor of the defendant on October 26, 1936.

7.

26 The Court erred in signing the judgment in favor of the defendant which was rendered on October 6, 1936, on November 19, 1936.

8.

The Court erred in failing to hold that the defendant ~~Illinois~~ Central Railroad Company, under the facts set forth in the stipulation, "knowingly and wilfully" failed to unload the animals within the statutory time within the meaning of Sections 71, 73 and 74 of Title 45 United States Code.

9.

The Court erred in failing to hold that there was no evidence before the Court to show that the failure to unload the animals within the statutory time limit was due to a cause other than its "knowing and wilful" conduct within the meaning and intent of Sections 71, and 73 of Title 45 United States Code.

10

The Court erred in failing to hold that Sections 71 and 73 of Title 45 United States Code should be read in pari materiae, and an action for a penalty as provided in Section 73, Title 45 United States Code. In other words, in order to determine whether an action of a carrier has been "knowingly and wilfully" committed as set forth in Section 73, the language in Section 71 of the Act should be considered.

11.

The Court erred in failing to hold that a negligent failure to comply with Sections 71 and 73 of Title 45 United States Code, with a full knowledge of facts as set forth in the stipulation and answer is a "knowing and wilful" failure within the meaning of the cruelty to animals act.

12.

The Court erred in failing to hold that under the undisputed facts of this case there was a violation of the cruelty to animals act by the Illinois Central Railroad Company, and the United States of America was entitled to judgment sustaining its motion for judgment

on the face of the pleadings and also sustaining its motion for judgment at the conclusion of the trial of the cause.

Wherefore plaintiff prays that said judgment may be reversed and for such other and further relief as to the Court may seem just and proper.

New Orleans, Lousiana, January 27th, 1937.

(Signed) RENE A. VIOSCA,
United States Attorney.

(Signed) ROBERT WEINSTEIN,
Assistant United States Attorney

Attorneys for United States of America,
Plaintiff

Presented this 27 day of January, 1937

United States District Judge

27 BILL OF EXCEPTION No. 1

Filed Jan. 27, 1937.

In the District Court of the United States
for the Eastern District of Louisiana
New Orleans Division

United States of America,
Plaintiff,

vs. No. 232 Law

Illinois Central Railroad Company, a corporation,
Defendant.

BILL OF EXCEPTIONS #1

Be it remembered that:

Plaintiff filed its petition on March 22, 1933, a true copy of which is attached hereto and made part hereof, and the defendant filed its answer on May 22, 1933, a true copy of which is attached hereto and made part hereof, and the plaintiff filed a motion for judgment on the face of the pleadings on April 19, 1934, a true copy of which is attached hereto and made part hereof. A hearing on said motion for judgment on the face of the pleadings was had on April 25, 1934 at which time the Government urged that judgment should be rendered in favor of the United States of America for the following reasons, to-wit:

1.

The Government contended that the defendant, Illinois Central Railroad Company, under the facts set forth in

the plaintiff's petition and admitted by the defendant in its answer together with the affirmative admissions of the defendant in its answer, "knowingly and wilfully" failed to unload the animals within the statutory time, within the meaning of Sections 71, 73 and 74 of Title 45 United States Code.

2.

The Government contended that the defendant, Illinois Central Railroad Company, a corporation, could of course only act through agents and its answer expressly alleges that "through oversight the Night General Yardmaster negligently failed to notify the employee of the Illinois Central Railroad Company, whose duty it was to unload the car, that the cattle would be placed for delivery in the early hours of the morning, and because of said oversight and said negligent action of the Night General Yardmaster the said car was not unloaded until 4:00 A. M. on the morning of October 10th."

28 The Government further contended that the facts expressly alleged in the answer negative the claim that the failure to rest, feed and water was not the result of knowledge and wilfulness on the part of the company; that it knew through its agents, and through them only could know, that the cattle were loaded on its cars, when their transportation commenced, where it should rest, water and feed them as required by the statute, instead of doing which, it, through its agents, continued to load them in its cars longer than the statutory period without rest, feed or water; that when the company did this according to its own averments by and through the only means it transported or could transport them at all, viz., its agents, they did so "knowingly and wilfully" within the meaning of the cruelty to animals act, Sections 71, 73 and 74 Title 45 United States Code.

3.

The Government contended that Section 71 of Title 45 United States Code sets forth a proviso which releases a carrier from liability where there has been an over-confinement of animals when prevented by "storm or other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight." The Government further contended that since the carrier seeking to avail itself of the defense afforded by the proviso must prove its diligence it cannot be said that by merely denying it "knowingly and wilfully" failed to unload the animals, it may escape the statutory penalty by proving negligence.

4.

The Government contended that a negligent failure to comply with the law, with full knowledge of the facts as set forth in the admissions contained in the defendant's answer considered with the plaintiff's petition, which allegations are in the main admitted by the defendant's answer, is a "knowing and wilful" failure within the meaning of the cruelty to animals act.

The Court after argument took the case under advisement and on June 27, 1935 overruled the Government's motion for judgment on the face of the pleadings, to which ruling the government reserved a bill of exceptions, annexing hereto all of the original offerings above set forth and has made the same a part of this, its bill of exceptions, and now having presented

same to counsel for defendant, does present it
29 to the Court and respectfully prays that it be settled and signed.

New Orleans, Louisiana, this 27 day of January, 1937.

(Signed) WAYNE G. BORAH,
Judge.

Approved:

(Signed) RENÉ A. VIOSCA,
United States Attorney.

(Signed) ROBERT WEINSTEIN,
Assistant U. S. Attorney.

(Signed) LEMLE, MORENO & LEMLE,
Counsel for Defendant.

30 NOTE:

Petition attached to Bill of Exception No. 1, omitted from transcript, being the same as petition copied at page 2 of this transcript.

31 NOTE:

Answer, attached to Bill of Exception No. 1, omitted from transcript, being the same as answer copied at page 5 of this record.

32 NOTE:

Plaintiff's motion for judgment, filed April 19, 1934, omitted from transcript, being the same as plaintiff's motion for judgment, copied at page 9 of this record.

33 BILL OF EXCEPTION #2

Filed Jan. 27, 1937.

In the District Court of the United States
for the Eastern District of Louisiana
New Orleans Division

United States of America,
Plaintiff

vs. No. 232 Law

Illinois Central Railroad Company, a corporation,
Defendant

BILL OF EXCEPTIONS #2

Be it remembered that:

This cause was set for trial on January 22, 1936 at which time the parties to the case offered in evidence a signed stipulation of the facts which included a waiver of trial by jury. The Government filed a motion for judgment as prayed for in the petition, a true copy of which is annexed hereto and made part hereof, on the following grounds, to-wit:

1.

The Government contended that the defendant, Illinois Central Railroad Company, under the facts set forth in the pleadings and stipulation by the parties to the cause, "knowingly and wilfully" failed to unload the animals within the statutory time, within the meaning of Sections 71, 73 and 74 of Title 45 United States Code.

2.

The Government contended that the defendant, Illinois Central Railroad Company, a corporation, could of course only act through agents and the pleadings and stipulation by the parties to the cause expressly allege that "through oversight the Night General Yardmaster negligently failed to notify the employee of the Illinois Central Railroad Company, whose duty it was to unload the car, that the cattle would be placed for delivery in the early hours of the morning, and because of said oversight and said negligent action of the Night General Yardmaster the said car was not unloaded until 4:00 A. M. on the morning of October 10th." The Government contended further that the facts expressly alleged in the pleadings and stipulation by the parties to the cause negative the claim that the failure to rest, feed and water was not the result of knowledge and wilfulness on the part of the company; that it knew through its agents, and through them only could know,

34 that the cattle were loaded on its cars, when their transportation commenced, where it should rest, water and feed them as required by the statute, instead of doing which, it, through its agents, continued to load them in its cars longer than the statutory period without rest, feed or water; that when the company did this according to its own averments by and through the only means it transported or could transport them at all, viz., its agents, they did so "knowingly and wilfully" within the meaning of the cruelty to animals act, Sections 71, 73 and 74 Title 45 United States Code.

3.

The Government contended that Section 71 of Title 45 United States Code sets forth a proviso which re-

leases a carrier from liability where there has been an over-confinement of animals when prevented by "storm or other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight." The Government further contended that since the carrier seeking to avail itself of the defense afforded by the proviso must prove its diligence it cannot be said that by merely denying it "knowingly and wilfully" failed to unload the animals, it may escape the statutory penalty by proving negligence.

4.

The Government contended that a negligent failure to comply with the law, with full knowledge of the facts as set forth in the admissions contained in the pleadings and stipulation by the parties to the cause, which allegations are in the main admitted by the defendant's answer, is a "knowing and wilful" failure within the meaning of the cruelty to animals act.

The Court after argument took the case under advisement and on October 16, 1936 overruled the Government's motion for judgment, to which ruling the Government reserved a bill of exceptions, annexing hereto all of the original offerings above set forth and has made the same a part of this its bill of exceptions, and now having presented the same to counsel for de-
35 fendant, does present it to the Court and respectfully prays that it be settled and signed.

New Orleans, Louisiana, this 27th day of February, 1937.

(Signed) WAYNE G. BORAH,
Judge.

Approved:

(Signed) RENE A. VIOSCA,
Unitel States Attorney.

(Signed ROBERT WEINSTEIN,
Assistant U. S. Attorney.

(Signed) LEMLE, MORENO & LEMLE,
Counsel for Defendant.

36 NOTE:

Petition attached to Bill of Exception No. 2, omitted from transcript, being the same as petition copied at page 2 of this transcript.

37 NOTE:

Answer, attached to Bill of Exception No. 2, omitted from transcript, being the same as answer copied at page 5 of this record.

38 NOTE:

Motion for Judgment in favor of United States of America, attached to Bill of Exception No. 2, omitted from transcript, being the same as document copied at page 15 of this record.

39 NOTE:

Stipulation of facts and waiving trial by jury, attached to Bill of Exception No. 2, omitted from transcript, being the same as document copied at page 11 of this record.

40 BILL OF EXCEPTIONS No. 3

Filed January 27th, 1937.

In the District Court of the United States
for the Eastern District of Louisiana
New Orleans Division

United States of America,
Plaintiff

vs. No. 232 Law

Illinois Central Railroad Company, a corporation,
Defendant

BILL OF EXCEPTIONS #3

Be it remembered that:

On January 22, 1936, prior to the conclusion of the trial of this cause, counsel for the Government made a written request to the Court to render certain findings of fact and conclusions of law, a true copy of which is attached hereto and made part hereof.

The Court on October 6, 1936, made its findings of fact and conclusions of law, a true copy of which is attached hereto and made a part hereof, which findings were contrary to the request of the Government.

To the Court's failure to make its findings of fact and conclusions of law in accordance with the Government's request, the Government reserved this, its bill of exceptions, annexing hereto true copies of the stipulated statement of facts which include the waiver of trial by jury and the Court's findings of fact and conclusions of law,

annexing hereto all of the original offerings above set forth and has made the same a part of this, its bill of exceptions, and now having presented same to counsel for defendant does present it to the Court and respectfully prays that it be settled and signed.

New Orleans, Louisiana, this 27th day of January, 1937.

(Signed) WAYNE G. BORAH,
Judge

Approved:

(Signed) RENE A. VIOSCA,
United States Attorney

(Signed) ROBERT WEINSTEIN,
Assistant U. S. Attorney

(Signed) LEMLE, MORENO & LEMLE,
Counsel for Defendant.

41 NOTE:

Stipulation of facts and waiver of trial by jury, attached to Bill of Exception No. 3, omitted from the transcript, being the same as document copied at page 11 of the record.

42 NOTE:

Plaintiff's petition for findings of fact and conclusions of law, attached to Bill of Exception No. 3, omitted from transcript, being the same as document copied at page 18 of this record.

43 NOTE:

Findings of fact and conclusions of law, attached to Bill of Exception No. 3, omitted from transcript, being the same as document copied at page 22 of this record.

44 In the District Court of the United States for the Eastern District of Louisiana

United States of America,
Plaintiff,

—versus— No. 232 (Law)

Illinois Central Railroad Company, a corporation,
Defendant.

BILL OF EXCEPTIONS #4

Be it remembered that:

On October 6, 1936, the Court made its findings of fact and conclusions of law, a true copy of which is attached hereto and made part hereof, which findings of the Court were contrary to the findings requested by the Government, which request was filed with the Court at the conclusion of the trial on January 22, 1936, a true copy of which is attached hereto and made a part hereof.

To the Court's findings of fact and conclusions of law the Government reserved this, its bill of exceptions annexing hereto true copies of the stipulated statement of facts which include the waiver of trial by jury and the Court's findings of fact and conclusions of law; annexing hereto all of the original offerings above set forth and has made the same a part of this, its bill of exceptions, and now having presented same to counsel for defendant, does present it to the Court and respectfully prays that it be settled and signed.

New Orleans, Louisiana, this 27th day of January, 1937.

(Signed) WAYNE G. BORAH,
Judge.

Approved:

(Signed) RENE A. VIOSCA,
United States Attorney,

(Signed) ROBERT WEINSTEIN,
Assistant United States Attorney,

(Signed) LEMLE, MORENO & LEMLE,
Counsel for Defendant.

45 NOTE:

Stipulation of facts and waiving trial by jury, attached to Bill of Exception No. 4, omitted from transcript, being the same as document copied at page 11 of this record.

46 NOTE:

Plaintiff's petition for findings of fact and conclusions of law, attached to Bill of Exception No. 4, omitted from transcript, being the same as document copied at page 18 of this record.

47 NOTE:

Findings of fact and conclusions of law attached to Bill of Exception No. 4, omitted from transcript, being the same as petition copied at page 22 of this transcript.

48

PRAECIPE

Filed Jan. 27, 1937.

In the District Court of the United States
for the Eastern District of Louisiana
New Orleans Division

United States of America
Plaintiff

vs. No. 232 Law

Illinois Central Railroad Company, a corporation
Defendant

PRAECIPE

To the Honorable Henry J. Carter, Clerk of the United States District Court for the Eastern District of Louisiana:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record, the following and no other papers:

1.

The petition filed on March 22, 1933.

2.

The answer which was filed on May 22, 1933.

3.

The plaintiff's motion for judgment on the face of the pleadings which was filed on April 19, 1934.

4.

Order of the Court overruling plaintiff's motion for judgment on the face of the pleadings, together with the plaintiff's reservation of bill of exceptions which was entered on June 27, 1935.

5.

Stipulation between the parties to this cause which was filed on January 22, 1936.

6.

Motion for judgment on behalf of the United States of America.

7.

Motion for judgment which was filed on behalf of the defendant.

8.

Request for findings of fact and conclusions of law which was filed on behalf of the plaintiff.

9.

Order of Court and plaintiff's reservation of bill of exceptions to same entered on October 6, 1936 overruling plaintiff's motion for judgment.

10.

Court's findings of fact and conclusions of law signed by the Court on October 6, 1936.

11.

Order of Court refusing to make its findings in accordance with plaintiff's request for findings of fact and conclusions of law together with reservation of plaintiff's bill of exception.

12.

Order of Court allowing plaintiff bill of exception to its findings of fact and conclusions of law.

13.

Judgment of the Court dismissing plaintiff's suit rendered October 6, 1936 and signed November 19, 1936.

14.

Order of Court granting the plaintiff thirty additional days within which to perfect an appeal which was signed by the Court on November 25, 1936.

15.

Petition for appeal with date of filing.

16.

Order allowing appeal with date of ifling.

17.

Assignment of errors with date of filing.

18

Citation of appeal and acknowledgment of service thereon, with date of filing.

19.

This praecipe with acknowledgment of service thereon, with date of filing.

50 20.

Bills of exceptions with date of filing.

21.

Certificate of Clerk to the correctness of the record as to praecipe.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Fifth Circuit and to be filed in the office of the Clerk of the Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana on or before the 26th day of February, 1937.

This 27th day of January, 1937.

(Signed) RENE A. VIOSCA,
United States Attorney

Signed) ROBERT WEINSTEIN,
Assistant United States Attorney
Attorneys for Appellant

Service of the above praecipe accepted and acknowledged this 25th day of January, 1937, and all other and further service of the same waived.

(Signed) LEMLE, MORENO & LEMLE
Attorneys for Appellee

Clerk's Office:

I. H. J. Carter, Clerk of the United States District Court for the Eastern District of Louisiana, do hereby certify the foregoing 50 pages contain and form a full, true, complete and perfect transcript of the record, assignment of errors, and all proceedings in the case entitled "United States of America versus Illinois Central Railroad Company, a Corporation," No. 232 of the Law Docket of this Court, as made up in accordance with praecipe for transcript, copied herein.

Witness, my hand and the seal of said Court, at the City of New Orleans, Louisiana, this 8th day of February, A. D., 1937.

H. J. CARTER,
Clerk.

(Seal)

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission

Extract from the Minutes of April 21st, 1937

No. 8380

UNITED STATES OF AMERICA

v.

ILLINOIS CENTRAL RAILROAD COMPANY

On this day this cause was called, and, after argument by Robert Weinstein, Esq., Assistant United States Attorney, for appellant, and Selim B. Lemle, Esq., for appellee, was submitted to the Court.

Opinion of the court

Filed May 26th, 1937

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8380

UNITED STATES OF AMERICA, APPELLANT

v.

ILLINOIS CENTRAL RAILROAD COMPANY, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Louisiana

May 26, 1937

Before FOSTER, HUTCHESON and HOLMES, Circuit Judges.

HUTCHESON, Circuit Judge: Suing for penalties under the Cruelty to Animals Act,[1] the United States moved for judgment on the pleadings. This motion overruled and a jury waived, the cause was submitted upon an agreed statement of facts.

The District Judge concluding that the defendant had not, within the meaning of the Act, knowingly and wilfully failed to comply with its provisions, made findings and conclusions and gave judgment accordingly. This appeal tests whether, upon the facts pleaded, stipulated and found,[2] judgment for the United States

Note 1: Act of June 29, 1906, Chapter 3594, Sec. 1-3 and 4 (Title 45 U. S. C. A. Secs. 71–73 and 74).

Note 2: These were in effect that the failure to unload within the time allowed was the result not of deliberate purpose or intent on the part of the carrier or any of its employees to disobey the law, but of the negligent failure of the yardmaster to notify the employee, whose duty it was to unload them, that the car was being placed for unloading.

was demanded. In summary, this is the case the pleadings and stipulation made.

The complaint alleged (1) that the defendant did knowingly and wilfully confine a certain number of cattle in one of its cars for a period of more than thirty six, towit, thirty seven hours, without unloading them. (2) That defendant was not prevented from unloading by storm or other accidental or unavoidable causes which could not have been anticipated or avoided by the exercise of due diligence and foresight. Defendant in its answer (1) admitted that the cattle were actually confined in one of its cars for more than thirty six hours; (2) denied that they were knowingly and wilfully so confined, (3) alleged that their over-confinement was due to the negligent oversight of the night general yardmaster, in this; that though he had, in an earnest and bona fide attempt to comply with the law, taken extra precautions to get the cattle to the place of unloading in time, he had yet, through oversight alone, failed to give notice to the employee whose duty it was to unload them.

By the stipulation it was agreed (a) that there had been one hour's over-confinement of the cattle; (b) that defendant was not prevented from unloading the cattle by storm or other accidental or unavoidable cause; (c) that the defendant did not unload the cattle within the thirty six hours for the reasons and under the circumstances following, that defendant's night general yardmaster, having received advance information of the approximate time of the arrival of the cattle, had, in order to insure their prompt unloading within the time allowed, procured an extra engine and crew, and upon the arrival of the cars had caused them to be switched and placed in the Crescent City Packing Yards for unloading within the time allowed therefor by law; that the unloading was delayed, however, an hour beyond the time because the night general yardmaster though knowing how long the cattle had already been confined, and that they should be unloaded, failed to notify the employee of the defendant, whose duty it was to unload the car, that it was to be placed for delivery. The night yardmaster is now dead.

The District Judge found (1) all the facts stipulated to be true; (2) that the defendant attempted in good faith to comply with the statutory requirement; (3) that its failure to unload the cattle within the time was not knowing and wilful; (4) but was due to the negligent oversight of the night yardmaster in failing to notify the unloading employee, although he had made special efforts by using an extra train and crew, to comply with the law. He concluded that "negligence of an employee of a carrier while performing his regular duties is not equivalent to knowledge and wilfullness, as those words are used in Sec. 3 of the Act in question", and that "failure to unload due to such negligence, does not render the carrier liable for the penalty there provided." He further concluded that though there was actual negligence on the part of the yardmaster, and therefore

by imputation, of the carrier, it was not liable for the penalty because its failure to unload the cattle was not knowing and wilful within the Act.

The United States insists that Sec. 1 of the Act imposes an absolute duty to unload within the time allowed, "unless prevented by storm, or other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight", and that Sec. 3 imposes an equally absolute liability for penalties in all cases of failure to unload as required by, and except as excused in, Sec. 1, though the failure is not intentional but inadvertent. It insists, in short, that a failure to unload as provided in Sec. 1 is in law the knowing and wilful failure required under Sec. 3, though the failure to unload was not intentional or with conscious purpose, but the result of mere inadvertent, and unintentional, oversight. It therefore urges upon us that the carrier, having admitted the non-existence of any of the excuses provided for in Sec. 1, must stand in judgment, and that to hold otherwise would result in defeating the law by letting in, in every case, the defense of simple negligence. Appellee, on the other hand, with equal vigor insists that the construction the United States contends for in effect reads out of the statute the two words "knowing and wilful", which, having a fixed and settled meaning in law, essentially condition liability to penalties. It therefore urges upon us that in view of this conditioning, the agreed statement of facts, and the court's findings, no other judgment than one for it could have been entered. It argues that this is so, because (1) the stipulation containing no admission, and there being no evidence, that the failure to unload the cattle was knowing and wilful, the United States has wholly failed in its proof of the ultimate facts, knowingness and wilfulness, essential to its recovery; United States vs. Boston & M. R. R., 84 Fed. (2d) 365, and (2) if the facts agreed to are sufficient to support an inference that the violation was knowing and wilful, they are certainly equally, if not more, sufficient to support the opposite inference, and the District Judge, to whom the utimate issue was submitted, has affirmatively found that the failure to unload was not knowing and wilful, but merely inadvertent.

We think appellee has the right of it. To take appellant's view we should have to disregard the settled meaning of the words "knowing and wilful" when used in penalty and criminal statutes. To take that view we should have to assume that Congress in Sec. 3 idly used two words of known and settled legal meaning, intending that the section should be read as though they were not in it. To take that view we should have to close our eyes to the obvious distinction which Congress plainly intended and aptly made by the use of the words in question, between the duty to unload unless prevented by causes beyond its control, imposed upon the carrier by Sec. 1, and the liability for penalties imposed upon it by Sec. 3 for knowingly and wilfully failing to perform the imposed duty.

There is some difference of opinion in the authorities as to the meaning and intent of the Act. A few decisions [3] have taken the view of it the United States urges upon us. The current of authority, however, runs strongly the other way [4] in accordance with the general rule that the word "wilfully" when used in statutes of this kind, has the well-defined meaning of deliberate and conscious purpose, and that statutes in which it is found subject to penalty or punishment only those who deliberately and consciously, that is, with set purpose, do what they are forbidden by the statutes to do. Such statutes do not subject to penalties those who, though they violate them, do so unintentionally through oversight, or simple negligence.

In C. B. & Q. Ry. vs. United States, 194 U. S. 342, it was said of "wilfully" as used in this statute—

"'Wilfully' means purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."

In United States vs. Lehigh Valley R. Co., 204 Fed. 705, it was said of the same statute—

"The verdict requires us to assume that the lambs were not fed within the statutory period; but we repeat that in our opinion the fact is accounted for by negligence, and cannot be attributed to a 'knowing and wilful' disregard of duty.

"These words mean something more than 'negligent.' A knowing and wilful omission to perform a duty is not, we think, the same as a merely careless omission."

In United States vs. Murdock, 290 U. S. 394, it is said of "wilfully" when used in a penal statute—

"The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose. * * * without justifiable excuse * * * stubbornly, obstinately, perversely * * * or conduct marked by careless disregard whether or not one has the right so to act." Citing among others, United States vs. Philadelphia & R. Ry. Co., 223 Fed. 207.

In Hargrove vs. United States, 67 Fed. (2d) 821, in a criticism of the charge of the trial court, under a statute making wilfullness an element of the offense, it was said—

"The court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its wilful doing. In the first class of cases, especially in those

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Note 3: United States vs. St. Joseph Stockyards Co., 181 Fed. 625; United States vs. Atlantic Coast Line Ry. Co., 173 Fed. 764; Montana Cent. Ry. Co. vs. United States, 164 Fed. 400.

Note 4: United States vs. Boston & M. R. R. Co., 84 Fed. (2d) 365; United States vs. Lehigh Valley R. Co., 204 Fed. 705; United States vs. Southern Ry. Co., 1 Fed. (2d) 607; St. Louis Merchants Bridge Terminal Ry. Co. vs. United States, 209 Fed. 600; St. Louis & S. F. R. Co. vs. United States, 169 Fed. 69; St. Joseph Stockyards Co. vs. United States, 187 Fed. 104; Oregon-Washington R. & Nav. Co. vs. United States, 205 Fed. 337.

offenses mala prohibita, the law imputes the intent * * *. Had the prosecution here been under such a statute, the charge of the court would have been unexceptionable. In the second class of cases a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence."

The judgment was right. It is affirmed.

Judgment

Extract from the Minutes of May 26th, 1937

No. 8380

UNITED STATES OF AMERICA

v.

ILLINOIS CENTRAL RAILROAD COMPANY

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Clerk's certificate

United States of America

United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 52 to 60 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8380, wherein United States of America is appellant, and Illinois Central Railroad Company is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 51 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 3rd day of July, A. D. 1937.

[SEAL]

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice BLACK took no part in the consideration and decision of this application.

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11007—37

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

UNITED STATES OF AMERICA, PETITIONER
v.
ILLINOIS CENTRAL RAILROAD COMPANY, A CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled case, entered on May 26, 1937.

OPINIONS BELOW

The trial court's findings of fact and conclusions of law appear at R. 22–24. The opinion of the Circuit Court of Appeals (R. 52) is reported in 90 F. (2d) 213.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 26, 1937. The jurisdiction of

this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in an action for penalties under the Cruelty to Animals Act of June 29, 1906, Sections 1, 3, 4, as amended (U. S. C., Title 45, Sections 71, 73, 74), the carrier can escape the penalty by showing that its default was due to the negligent oversight of one of its employees.

STATUTE INVOLVED

The applicable portions of the pertinent statute will be found in Appendix, *infra,* pp. 11–13.

STATEMENT

This is a civil action brought by the United States of America, petitioner, against the Illinois Central Railroad Company, a corporation, hereinafter referred to as respondent, to recover a penalty of not less than $100 nor more than $500 under the Act of June 29, 1906, Chapter 3594, Sections 1, 3, and 4, 34 Stat. 608, as amended, Title 45 U. S. C., Sections 71, 73, and 74, commonly known as the Cruelty to Animals Act.

The petition (R. 2) alleges that respondent "knowingly and wilfully" confined cattle in a car between Hermanville, Mississippi, and New Orleans, Louisiana, for 37 hours without unloading them for rest, water, and feeding, and that respondent actually transported them from Jackson, Mississippi, to New Orleans, Louisiana, the transportation from Hermanville, Mississippi, to Jackson,

Mississippi, being by the Yazoo and Mississippi Valley Railroad Company.

Respondent, in its answer (R. 5), admitted the confinement for the period alleged in the petition (37 hours), but denied that it did so "knowingly and wilfully" and set up an affirmative defense (R. 7) that the confinement was the result of the negligence of its night general yard master at New Orleans, who had been advised by telegraph of the approximate time of arrival of this car of cattle and when the legal confinement period of the cattle would expire. Upon the petition and answer, petitioner moved for judgment (R. 9), which motion was overruled (R. 10).

The parties then entered into a stipulation of facts and waived trial by jury (R. 11). It was agreed, among other things, that the car was loaded with cattle at Hermanville, Mississippi, at 3 p. m. on October 8, 1932, and shipped to New Orleans, Louisiana, with a 36-hour release signed by the shipper (R. 12). This car arrived at Stuyvesant Stock Yards at 11:35 p. m. on October 9, 1932, with two other cars of cattle (R. 13). Respondent's night general yard master received advance information from respondent's dispatcher at McComb of the approximate time of arrival of these three cars and when the period of confinement for the cattle expired. Because of the necessity of prompt handling of the cattle and the improbability of handling it on regular trains, an extra engine and crew were procured and were in waiting for

the arrival of the cars of cattle. These cars were immediately switched and placed in the Crescent City Stock Yards for delivery at 2:50 a. m. on October 10, 1932, at which time the period allowed for the confinement of the cattle had not elapsed, and the car containing the cattle was placed for unloading within said period of time (R. 13–14).

It was further agreed that the night general yard master, knowing how long the cattle had already been confined, failed to notify the employee of the Illinois Central Railroad, whose duty it was to unload the car, that the cattle car was to be placed for delivery in the early hours of the morning, and because of this failure of the night general yard master, the car was not unloaded until 4 a. m. on the morning of October 10, 1932, the total period of confinement being 37 hours. It was the duty of the night general yard master, under the instructions of the Illinois Central Railroad Company, to notify the employee of that railroad as to when the cars would be placed for delivery (R. 14).

The case was submitted to the District Judge on the agreed statement of facts. Both parties filed requests for findings of fact and conclusions of law (R. 18). Petitioner moved for judgment and for findings of fact and conclusions of law (R. 18–21), which motion was denied (R. 25), reserving to petitioner a bill of exception to conclusions of law and findings of fact and each of them (R. 26). The court, on October 6, 1936, rendered judgment in favor of respondent (R. 27), dismissing the suit,

and making special findings of fact and conclusions of law requested by respondent (R. 22). The court found that respondent "attempted in good faith to comply with the statutory requirement to unload the cattle within the statutory period" (R. 22); that the failure to unload within the statutory period "was due to the negligent oversight of the night general yard master employed by the said defendant in failing to notify an employee of the Illinois Central Railroad Company to unload the said car of cattle within the statutory period" (R. 22–23). The court also found that respondent, through its proper employee, knew how long the animals had been confined (R. 23).

The court held as a conclusion of law that Section 1 of the Act (U. S. C., Title 45, Section 71) should not be read in pari materia with Section 3 of the Act (U. S. C., Title 45, Section 73). In other words, in order to determine whether the default of the carrier has been "knowingly and wilfully" committed under Section 3, the language of Section 1 cannot be considered (R. 23). The court also held that the "negligence of an employee * * *" is not equivalent to knowledge and wilfulness as required in Section 3 of the Act (R. 23–24).

An appeal was taken from the judgment of the District Court and on May 26, 1937, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the failure of respondent to unload the cattle did not render it liable to the penalty where such failure was due to the oversight or negligence of its night general yard master to notify the appropriate employee to unload the cars.

2. In failing to hold that the negligence of respondent rendered it, as a matter of law, liable to the statutory penalty.

3. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. In holding that the failure of respondent to unload the cattle did not render it liable to penalty, where such failure was due to the oversight or negligence of its night general yardmaster to notify its employee charged with the duty of unloading to unload the cattle, the decision of the court below is squarely in conflict with the decisions of the Circuit Court of Appeals for the Fourth Circuit in the case of *United States* v. *Atlantic Coast Line Railroad,* 173 Fed. 764, and the Circuit Court of Appeals for the Ninth Circuit in the cases of *Montana Cent. Ry. Company* v. *United States,* 164 Fed. 400, and *Oregon-Washington R. & Nav. Co.* v. *United States,* 205 Fed. 337. The decision appears also to be in conflict with that of the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Union Pac. R. Co.,* 169 Fed. 65 (C. C. A.

8th). On the other hand, the decision below does find support in decisions in the Third and Sixth Circuits. *United States* v. *Lehigh Valley R. Co.*, 204 Fed. 705 (C. C. A. 3d); *United States* v. *Southern Ry. Co.*, 1 F. (2d) 607 (D. C. E. D. Tenn.).

The conflict is hinged about the interpretation of the words "knowingly and wilfully" as used in the statute. Those courts that regard the statute as in the nature of a criminal one essentially require an evil or malevolent intent to be shown to enforce liability. It is to be noted, however, that Section 4 provides that the penalty created by the preceding section should be recovered by civil action. In *United States* v. *Atlantic Coast Line Railroad, supra,* regarding the statute involved in this case, the court stated (p. 767):

> It has been decided a number of times that the statute in question is not a criminal one, and that it should not be construed according to the strict rules by which courts are governed in criminal cases.

And so the court there held that negligence was no defense, stating (p. 769):

> It is well settled that a corporation can only act through its agents, and, such being the case, it necessarily follows that a lack of foresight and due diligence on the part of those acting as agents in complying with the statute is negligence. Therefore, in this instance, we think the corporation has, within the meaning of the statute, "knowingly" and "willfully" failed to comply with the law,

notwithstanding the fact that there may have been no evil motive or intent in the transaction. In other words, we think *a negligent failure to comply with the law, with a knowledge of facts as shown in this instance, is willful failure.* [Italics supplied.]

Similarly, in *Montana Cent. Ry. Company* v. *United States, supra,* it was held that "oversight, forgetfulness, and unintentional neglect" of the railroad's train dispatchers, contrary to its rules and orders, is no defense.[1]

2. The decision in the instant case renders the statute virtually inoperative. As a matter of fact, practically all the violations of the Twenty-eight Hour Law are due in the final analysis to negligence in one form or another of railroad employees rather than to any deliberate purpose to violate the Act. In *United States* v. *Union Pacific Railroad Com-*

[1] While, as shown above, there is a conflict of decisions, it may be observed that a number of the decisions cited by the court below do not support its conclusion. In *Oregon-Washington Railroad and Navigation Co.* v. *United States,* 265 Fed. 337 (C. C. A. 9th), where the facts were substantially the same as in the instant case, the court held that they were indicative of a violation of the Act. In *Chicago, B. and Q. R. R.* v. *United States,* 194 Fed. 342 (C. C. A. 8th) there was no evidence of negligence. In *St. Joseph Stockyards Co.* v. *United States,* 187 Fed. 104 (C. C. A. 8th), the question of negligence was not involved. *United States* v. *Boston & M. R. R. Co.,* 84 F. (2d) 365 (C. C. A. 1st), was decided on a procedural question. In *St. Louis & S. F. R. Co.* v. *United States,* 169 Fed. 69 (C. C. A. 8th), and in *Merchants Bridge Terminal Ry. Co.* v. *United States,* 209 Fed. 600 (C. C. A. 7th), it was held there was not sufficient evidence to support the finding of lack of diligence on the part of the carrier.

pany, 169 Fed. 65, *supra,* at page 68, the court stated:

> It can hardly be conceived that any reputable carrier would deliberately and designedly because of ill will or other malevolent feeling towards the dumb animals or their owners fail to conform to the reasonable and humane requirement of the law. If the law be operative only to restrain the possible exercise of such evil and perverse disposition, it would have little, if any, scope of operation. The real purpose of the legislation in our opinion was to alleviate the condition of dumb animals in transit. The desire to curtail expense and promote economy of operation naturally encourages indifference to if not a disregard of every impediment to quick and cheap transportation. The Act of June 29, 1906, we think, was aimed at this natural propensity, and is a condemnation of indifferent more than malevolent conduct. So far as the dumb animals are concerned, the effect is the same in either case. They would suffer just as much if deprived of rest, water, and food by indifference of the carrier as they would by his malevolence. The meaning we ascribe to the word "willfully" gives a reasonable scope of operation to the act, while the meaning contended for by defendant's counsel practically nullifies it.

The foregoing reasoning applies to conduct which reflects negligence as well as to that which reflects indifference.

The question involved is one of importance to the Government. Effective enforcement of the Twenty-eight Hour Law depends on a resolution of the conflict in its construction. There are several cases pending in the Eastern District of Louisiana in which negligence has been offered as an affirmative defense. These cases are now awaiting final determination of this question. The construction given the word "willfully" by the court below, if universally adopted, would make it impossible to punish any overconfinement due to negligence, which in the last analysis is the cause of these violations. For this reason the construction of the statute should be authoritatively settled by this Court.

Wherefore it is respectfully submitted that the petition should be granted.

STANLEY REED,
Solicitor General.

AUGUST 1937.

APPENDIX

UNITED STATES CODE, TITLE 45, ACT OF JUNE 25, 1906, C. 3594, SECS. 1, 3, 5, 34 STAT. 607, AS AMENDED

SECTION 71. No railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens, for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: *Provided,* That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any

printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this chapter to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided,* That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

SECTION 72. Animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section 71 of this chapter,

but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

SECTION 73. Any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than $100 nor more than $500: *Provided,* That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

SECTION 74. The penalty created by the preceding section shall be recovered by civil action in the name of the United States in the district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States Attorneys to prosecute all violations of this chapter reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 352

UNITED STATES OF AMERICA, PETITIONER

v.

ILLINOIS CENTRAL RAILROAD COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The trial court's findings of fact and conclusions of law appear at R. 22–24. The opinion of the Circuit Court of Appeals (R. 52) is reported in 90 F. (2d) 213.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 26, 1937. (R. 56.) The petition for writ of certiorari was filed August 26, 1937, and granted October 11, 1937 (R. 57). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in an action for penalties under the Cruelty to Animals Act of June 29, 1906, the carrier can escape the penalty by showing that its default was due to the negligent oversight of one of its employees.

STATUTE INVOLVED

The applicable portions of the pertinent statutes will be found in the Appendix, *infra,* pp. 32–36.

STATEMENT

This is a civil action brought by the United States of America, petitioner, against the Illinois Central Railroad Company, a corporation, hereinafter referred to as respondent, to recover a penalty of not less than $100 nor more than $500 under the Act of June 29, 1906, c. 3594, Sections 1, 3, and 4, 34 Stat. 607, as amended (U. S. C., Title 45, Sections 71, 73, and 74), commonly known as the Cruelty to Animals Act.

The petition (R. 2) alleges that respondent "knowingly and wilfully" confined cattle in a car between Hermanville, Mississippi, and New Orleans, Louisiana, for 37 hours without unloading them for rest, water, and feeding, and that respondent actually transported them from Jackson, Mississippi, to New Orleans, Louisiana, the transportation from Hermanville, Mississippi, to Jackson, Mississippi, being by the Yazoo and Mississippi Valley Railroad Company.

Respondent, in its answer (R. 5), admitted the confinement for the 37-hour period alleged in the petition, but denied that it did so "knowingly and wilfully" and set up as an affirmative defense (R. 7) that the confinement was the result of the negligence of its night general yardmaster at New Orleans, who had been advised by telegraph of the approximate time of arrival of this car of cattle and when the legal confinement period of the cattle would expire. Upon the petition and answer, petitioner moved for judgment (R. 9), which motion was overruled and an exception reserved (R. 10).

The parties then entered into a stipulation of facts and waived trial by jury (R. 11). It was agreed, among other things, that the car was loaded with cattle at Hermanville, Mississippi, at 3 p. m. on October 8, 1932, and shipped to New Orleans, Louisiana, with a 36-hour release signed by the shipper (R. 12). This car arrived at Stuyvesant Dock [Stock] Yards at 11:35 p. m. on October 9, 1932, with two other cars of cattle (R. 13). Respondent's night general yardmaster received advance information from respondent's dispatcher at McComb of the approximate time of arrival of these three cars and when the period of confinement for the cattle would expire. Because of the necessity of prompt handling of the cattle and the improbability [difficulty] of handling it on regular trains, an extra engine and crew were procured and were in waiting for the arrival of the cars of cattle.

These cars were immediately switched and placed in the Crescent City Stock Yards for delivery at 2:50 a. m. on October 10, 1932, at which time the period allowed for the confinement of the cattle had not elapsed, and the car containing the cattle was placed for unloading within such period of time. (R. 13–14.)

It was further agreed that respondent's night general yardmaster, knowing how long the cattle had already been confined, failed to notify the employee of the Illinois Central Railroad whose duty it was to unload the car, that the cattle car was to be placed for delivery in the early hours of the morning, and because of this failure of the night general yardmaster, the car was not unloaded until 4 a. m. on the morning of October 10, 1932, the total period of confinement being 37 hours. It was the duty of the night general yardmaster, under the instructions of the Illinois Central Railroad Company, to notify the employee of that railroad as to when the cars would be placed for delivery (R. 14).

The case was submitted to the District Court on an agreed statement of facts. (R. 22.) Both parties moved for judgment (R. 15, 16) and the petitioner requested findings of fact and conclusions of law (R. 18–21). The court denied the petitioner's motion for judgment and request for findings of fact and conclusions of law and reserved to the petitioner a bill of exceptions to each of the rulings (R. 25) as well as a bill of exceptions (R.

26) to the findings of fact and conclusions of law which the court entered (R. 22–24). The court, thereupon, rendered judgment in favor of respondent (R. 27) dismissing the suit.

In its findings of fact, the court found, *inter alia,* that respondent "attempted in good faith to comply with the statutory requirement to unload the cattle within the statutory period" (R. 22); that the failure to unload within the statutory period "was due to the negligent oversight of the night yardmaster employed by the said defendant in failing to notify an employee of the Illinois Central Railroad Company to unload the said car of cattle within the statutory period" (R. 22–23); and the respondent, through its proper employee, knew how long the animals had been confined (R. 23).

In its conclusions of law, so far as they are here pertinent, the court held that Section 1 of the Act (U. S. C., Title 45, Section 71) should not be read in *pari materia* with Section 3 of the Act (U. S. C., Title 45, Section 73). In other words, in order to determine whether the default of the carrier has been "knowingly and wilfully" committed under Section 3, the language of Section 1 cannot be considered (R. 23). The court also held that the "negligence of an employee * * *" is not equivalent to knowledge and wilfulness as those words are used in Section 3 of the Act, and that "although there was actual negligence as set forth

in the conclusions of fact and the stipulation, there was no wilfulness and knowledge within the meaning of Section 73, Title 45 U. S. C. A. [Sec. 3 of the Act]."

Upon appeal, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court (R. 52–56).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the failure of respondent to unload the cattle did not render it liable to the penalty where such failure was due to the oversight or negligence of its night general yardmaster to notify the appropriate employee to unload the cars.

2. In failing to hold that the negligence of respondent rendered it, as a matter of law, liable to the statutory penalty.

3. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

1. The word "wilfully" as used in the statute here involved denotes an act which is voluntary as distinguished from accidental. There are many authoritative opinions which so define the word and the Government contends such definition is aptly suited to the application of the word as used in this statute.

A. In construing the words "knowingly and wilfully", Section 3 of the Act should be read in *pari materia* with Section 1. In the first section of the Act, Congress created a prohibition against overconfinement of animals by carriers. In the third section it imposed a sanction for a knowing and wilful violation of the prohibition. Legislative sanctions are usually as broad as their prohibitions. Where words such as "knowingly and wilfully", having many legal significations, are used in a statute, the entire context must be examined to determine the legislative intent.

B. The Cruelty to Animals Act is remedial in nature and the words "knowingly and wilfully" should be construed in a manner consistent with the humane objects of the Act. The fact that a penalty is imposed for a violation of its provisions does not make it a penal law in the sense that it must be strictly construed. In this case the penalty does not follow as the result of the commission of a crime but is a mere sanction to enforce an obligation validly imposed upon carriers by Congress to effect a public good. The Act being as it is a humanitarian law should be fairly and reasonably construed so as to effectuate its purpose.

C. The legislative history of the Act and the Congressional debates thereon, indicate clearly that Congress intended to subject to the penalty provision of the Act that carrier who, having full knowl-

edge of the facts, negligently fails to unload the animals within the statutory period.

D. The court below evidently entertained the belief that the statute here is in the nature of a criminal statute. It is believed that, because of this erroneous belief, the court applied the strict rules of construction applicable to such statutes. Though there is a conflict of decisions regarding the interpretation of the words "knowingly and wilfully" as used in this statute, the cases are uniform in holding that this is not in the nature of a criminal statute.

II. A careful analysis of the cases which have dealt with this statute discloses a preponderant weight of authority to the effect that the carrier who negligently fails to unload within the statutory period is subject to the penalty provision of the Act.

ARGUMENT

I

THE WORD "WILFULLY" AS USED IN THIS STATUTE DENOTES AN ACT WHICH IS VOLUNTARY AS DISTINGUISHED FROM ACCIDENTAL

In the case at bar the respondent failed to unload the cattle within the statutory period as a result of the negligence or oversight of its night general yardmaster who, having knowledge of the facts, failed to notify the employee charged with the duty of unloading the cattle. The sole question here is

whether this act of omission, with full knowledge of the facts, constitutes a violation of the Cruelty to Animals Act which penalizes one who "knowingly and wilfully" fails to comply with its provisions. The Government contends that such omission with knowledge of the facts constitutes a "knowing and wilful" failure. The opinion of the Circuit Court of Appeals (R. 55) seems to be predicated upon the assumption that the statute in question is in the nature of a criminal one and should therefore be strictly construed. The court discounted the view taken by the Government that the aforementioned words as used in this Act have no legal meaning apart from the exceptions provided in Section 1 of the Act. The court conceded a conflict in authorities as to the meaning and intent of the Act, citing several cases supporting the Government's contention. Despite these authorities the court below was of the opinion that the weight of authority runs strongly the other way, stating that the general rule is that the word "wilfully" when used in statutes of this kind has the well defined meaning of *deliberate* and *conscious* purpose. In other words, the court concluded that statutes using the word "wilfully" and imposing a penalty or punishment for its violation would apply to only "those who deliberately and consciously, that is, with set purpose, do what they are forbidden by the statutes to do. Such statutes do not subject to penalties those who, though they vio-

late them, do so unintentionally through oversight, or simple negligence." (R. 55.)

We submit that this construction of the statute here involved by the court below is not consonant with the plain meaning of its language.

This case, as shown, turns on the interpretation of the word "wilfully" as used in Section 3 of the Act. The word has a variety of well defined legal connotations. This variety of definition is attributable to the different classes of statutes in which it is used, as is indicated in *United States* v. *Murdock,* 290 U. S. 389, 394, where it is said:

> The word often denotes an act which is intentional, or knowing, or *voluntary as distinguished from accidental.* But when used in a criminal statute it generally means an act done with a bad purpose * * * without justifiable excuse * * * stubbornly, obstinately, perversely * * * or conduct marked by careless disregard whether or not one has the right so to act. [Italics ours.]

We submit the statute involved in this case represents that situation spoken of in the *Murdock* case *supra* wherein the word "wilfully" is used to connote an act which is voluntary as distinguished from accidental. The application of this construction is brought out in *United States* v. *Atchison, Topeka and Santa Fe Railway Company,* 166 Fed. 160 (N. D. Ill.), where the court construed "wil-

fully" in the Cruelty to Animals Act as synonymous with "voluntarily" and stated, p. 163:

> In the selection of this language Congress could not have inserted the word "wilfully" as implying a vicious intent to injure, for certainly Congress did not even suspect that any transportation company would ever confine live stock beyond the period prescribed for the *deliberate* purpose of inflicting injury on the stock or of imposing a loss upon the shipper or deteriorating the product of the slaughter-house. It is more rational to conclude that Congress used the word as synonymous with "voluntarily" or "intentionally," and, bearing in mind the object sought by the law, the legislative intent seems to have been to require the imposition of the penalty in all cases of confinement beyond the period prescribed, except only when resulting from storm or from accidental or other unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight. [Italics ours.]

The necessity of this construction becomes quite obvious when the entire statute is read. Section 1 prohibits the overconfinement of animals unless caused by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight. Section 3 provides a penalty for a knowing and wilful overconfinement. It cannot reasonably be

doubted that Congress intended by Section 3 to penalize the doing of that which it prohibited in Section 1.

A. IN CONSTRUING THE WORDS "KNOWINGLY AND WILFULLY" SECTION 3 OF THE ACT SHOULD BE READ IN *PARI MATERIA* WITH SECTION 1

The court below rejected the Government's contention that Section 3 must be read in *pari materia* with Section 1, because it says to do so, "we should have to assume that Congress in Section 3 idly used two words [knowingly and wilfully] of known and settled legal meaning, intending that the section should be read as though they were not in it" (R. 54). But this reasoning proves too much for the purpose of the court's conclusion. We do not contend that the words must be rejected, but rather that they be attributed a meaning consistent with the entire context of the statute. To construe the words as the court below has done, it is necessary to conclude that Congress idly created a broad prohibition against overconfinement of animals in Section 1, and placed a very narrow sanction on its violation in Section 3. Legislative sanctions are usually as broad as their prohibitions.

Mr. Justice Story, commenting on a more or less similar situation in *United States* v. *Winn*, 3 Sumn. 209, says at p. 211:

> And where a word is used in a statute, which has various known significations, I know of no rule, that requires the Court to adopt one in preference to another, simply because it

> is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the proper course in all of these cases, is to search out and follow the true intent of the legislature, and to adopt that sense of the words, which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature.

See also *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 18, wherein this language is quoted with approval. The *Murdock* case, *supra,* is also to the same effect. At page 395 it is said:

> Aid in arriving at the meaning of the word "willfully" may be afforded by the context in which it is used (*United States* v. *Sioux City Stock Yards Co.*, 162 Fed. 556, 562.)

It is elementary law that every part of the statute should be read and the intention of the legislature extracted from the whole. See *Hellmich* v. *Hellman,* 276 U. S. 233; *Larkin* v. *United States,* 78 F. (2d) 951 (C. C. A. 8th).

B. THE CRUELTY TO ANIMALS ACT IS REMEDIAL IN NATURE AND THE WORDS "KNOWINGLY" AND "WILLFULLY" SHOULD BE CONSTRUED IN A MANNER CONSISTENT WITH THE OBJECTS OF THE ACT

The main object of the Act is to prevent cruelty to animals in transit. Another purpose is to prevent the slaughtering of animals for food when in a feverish condition resulting from long confine-

ment without food, water and rest. *United States* v. *Union Pacific Railroad Company,* 169 Fed. 65 (C. C. A. 8th); *United States* v. *Atlantic Coast Line Railroad Company,* 173 Fed. 764 (C. C. A. 4th). Since it acts to effect a public good, it is a remedial statute and should be construed in a manner so as to carry out the intention of Congress and effectually accomplish its objectives. The fact that a penalty is imposed for a violation of its provisions does not make it a penal law. The desire to give relief was more dominant than to inflict punishment for, while in one sense every Act imposing a penalty or forfeiture may be called a penal law, yet, as in the present case, such laws are often deemed, and truly deserve to be called, remedial. *Taylor* v. *United States,* 3 How. 197, 210; *Cliquot* v. *United States,* 3 Wall. 114, 145; *United States* v. *Stowell,* 133 U. S., 12; *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1.[1] In this case the penalty does not follow as the result of the commission of a crime, but is a mere sanction to enforce an obligation validly imposed by Congress. See *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, 331.

The question as to whether the Cruelty to Animals Act should be viewed as penal or remedial

[1] In this case, the Court in discussing the Safety Appliance Law said, at p. 17, "The primary object of the act was to promote public welfare by securing the safety of employees and travelers and it was in that aspect remedial, while for violations a penalty of one hundred dollars, recoverable in a civil action, was provided for, and in that aspect it was penal."

appears to have been settled by this Court in *Chicago & N. W. Ry. Co.* v. *United States,* 246 U. S. 512, where it was said (p. 517) that "the statute must be construed with a view to carrying its humanitarian purpose into effect * * *."

It is to be noted also that Section 4 of the Act provides that the penalty created by the preceding section should be recovered by civil action. In *United States* v. *Atlantic Coast Line Railroad Company, supra,* regarding the statute involved in this case, the court stated, at p. 767:

> It has been decided a number of times that the statute in question is not a criminal one, and that it should not be construed according to the strict rules by which courts are governed in criminal cases.

See also *New York Central & H. R. Railroad Co.* v. *United States,* 165 Fed. 833.

But even if the Act should be thought to be penal in a strict sense, inquiry into the intention of Congress is still proper and necessary. The Act should be interpreted according to the manifest import of the words and the most restricted sense should not be adopted as the true sense of the statute, merely because it imposes a penalty, unless it harmonizes with the legislative intent and accords to the remedy designed for the mischief. In *United States* v. *Lacl r,* 134 U. S. 624, the Court stated, p. 628:

> though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal

as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature.

C. THE LEGISLATIVE HISTORY AND CONGRESSIONAL DEBATES DISCLOSE THAT THE CRUELTY TO ANIMALS ACT WAS AIMED AT A CARRIER WHO, HAVING KNOWLEDGE OF THE FACTS, VOLUNTARILY FAILS TO UNLOAD THE ANIMALS WITHIN THE STATUTORY PERIOD

It has heretofore been shown that where a word which has various known significations has been used in a statute, it is the duty of the court to search out and follow the intent of the legislature and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature. The intent and purpose of Congress in using the words "knowingly and wilfully" in the Act here involved were clearly indicated when the Cruelty to Animals Act of March 3, 1873,[2] which subse-

[2] The Act of 1873, is the first Act dealing with what is commonly known as the Twenty-Eight-Hour Law. It is set forth in the Appendix, *infra*, pp. 34–36. In this Act the word "wilfully" is used. When this Act was copied into the Revised Statutes, Sections 4386–4390, the word "willingly" was substituted for "wilfully". Nothing has been found to indicate any reason for this substitution and we assume it was merely a typographical error. When the Act of 1906 was passed the provisions of R. S. 4386–4390 were repealed. The word "wilfully" is used in the Act of 1906. Nothing appears in the debates on this Act (Congressional Record, Vol. 40, pp. 8310, 8324) or in the Senate Report (No. 975, 59th Cong., 1st sess., Cong. Doc. 4904), with reference to this change. We accordingly assume it was made merely to correct the error heretofore suggested.

The Act of 1906 substantially reenacted the provisions of the Act of 1873. The only revision consisted of an extension

quently became R. S. 4386–4390, was debated. These debates are published in the Congressional Globe, Vol. 104, Part 5, 42d Congress, 1st Session at p. 4228, the pertinent parts of which are here set out:

> Mr. THURMAN. * * * How is it possible for the managers of one of these short roads to tell whether these cattle have been watered and fed and allowed 5 hours' consecutive rest within the last 28 hours? If ignorance of the fact is to excuse, then the bill is not effective; but if the company is to be punished without *knowing the fact* at all, although it acts in entire ignorance of it, then the bill is unjust.
>
> It seems to me that this requires some provision in this bill. * * * I am not prepared with an amendment. It would take considerable time to prepare an amendment that would meet that case; and yet the truth of it is that this bill visits the punishment upon the railroad company, *which has no knowledge* and *can have no certain knowledge,* has no means of knowledge whether the cattle have been properly cared for pursuant to the bill or not * * *. [Italics ours.]
>
> Mr. FRELINGHUYSEN. I will just say a word in answer to the Senator from Ohio, (Thur-

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of time from twenty-eight to thirty-six hours upon the written request of the owner or person in custody of the shipment. The Senate Report (there was no House Report) and the debates on this Act disclose nothing with regard to the meaning intended for the words "knowingly and wilfully". The 1906 Act incorporates these words as they were used in the original Act of 1873.

man) as he is a strong friend of the bill, which I do not question. As to the difficulty which he suggests, it does not occur to me at all. The difficulty is as to a railroad company not having the information as to how long cattle have been confined in the cars, 28 hours when a train comes to the railroad in question. * * * A way bill goes with the cattle, and at once, as soon as this bill is passed this fact would be on the way bill. There is not the slightest difficulty in the railroad company making arrangements so as to know with unerring certainty just how long the cattle have been in the cars. Besides that, if from the circumstances, they were deceived on the subject, they would not be guilty. I think that is a perfect answer.

Finally, on page 4235, the following proceedings are set forth:

Mr. CASSERLY. I wish to offer an amendment to insert on line 28, page 2, after the word "shall," the words "knowingly and wilfully;" so that a company which receives animals that have already been 28 hours without rest, water, or food, shall not be liable except the *scienter* is proved; in other words, except it is shown that the company *knew the fact*. [Italics ours.]

Mr. FRELINGHUYSEN. That is wholly unnecessary; that is the law now.

* * * * *

The yeas and nays were ordered; and being taken resulted—yeas, 22—nays, 18. * * * So the amendment was agreed to.

Under R. S. Sections 4386–4388, negligence of the carrier was held to be no defense. *Newport News & M. Val. Co.* v. *United States,* 61 Fed. 488 (C. C. A. 6th). In that case the failure to unload the cattle within the statutory period was due to an accident which was the result of the carrier's negligence. At p. 490 the court said:

> * * * If the accident was one which might have been avoided by due care, then the carrier must be taken to have contemplated the reasonable consequences of his own negligence. In this sense, he may be said to have "knowingly and willingly" failed to comply with the requirements of the law. If he was not prevented by lawful excuse, he has knowingly and willingly failed to unload for rest, food, and water, as required by law. The several sections of the act must be construed together. We must give effect to the first section, as well as to the third. To put the construction upon the words "knowingly and willingly" contended for by appellant, would be to eliminate the positive terms of the affirmative section of the act. Congress has specified the excuse which will take a case without the act. If the statutory contingencies are not shown to have prevented compliance, the carrier has willingly failed to unload as required.

The *Newport News* case is the only case found under R. S. Sections 4386–4388, wherein the defense

of negligence was raised and decided. No case presenting this question appears to have arisen under the original Act. It is submitted that since the penalty provisions of R. S. Sections 4386–4388 are substantially reenacted in the Act of 1906, Congress intended also to incorporate the judicial interpretation thereof.

Clearly Congress intended that a connecting carrier that had knowledge of the time of confinement and who nevertheless failed to unload the animals within the statutory period should be liable for the penalties. In the instant case, the carrier admitted having knowledge of the facts (R. 14), but negligently failed to unload the cattle, not being prevented by accidental or unavoidable causes. Congress obviously did not intend that *negligence* should be a good defense since it would defeat the purpose of the Act as indicated in the debates.

D. THE COURT BELOW ERRED IN REGARDING THE ACT AS A CRIMINAL STATUTE

The court below concludes its opinion (R. 55) as follows:

> In *Hargrove* vs. *United States*, 67 Fed. (2d) 821, in a criticism of the charge of the trial court, under a statute making wilfulness an element of the offense, it was said—
>
> "The court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its wilful doing. In the first class of cases, especially in

> those offenses mala prohibita, the law imputes the intent * * *. Had the prosecution here been under such a statute, the charge of the court would have been unexceptionable. In the second class of cases a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence."

It seems that the court here apparently places this case in that class of cases wherein a wrongful intent must be shown. This, we submit, is error. The *Hargrove* case in the quotation *supra* was dealing with the various classes of criminal statutes. Whatever conflict exists on the interpretation of the statute involved in this case, there is uniformity at least in the decisions to the effect that this is not a criminal statute. It is believed that the court below in failing to observe the distinction between criminal statutes and the statute involved in this case, was thereby misled into applying the strict rules of construction relating to criminal statutes.

The Cruelty to Animals Act deals with conduct which is not *malum in se* but *malum prohibitum* and it is not necessary to establish an evil intent to impose liability. *United States* v. *Union Pacific Railroad Co.*, 169 Fed. 65 (C. C. A. 8th). And in *United States* v. *Sioux City Stockyards Company*, 162 Fed. 556, 562, it was said:

> The statute in question [Cruelty to Animals Act] is not a criminal one in the sense that a violation of it constitutes a crime. A

> penalty is imposed for the violation, which is to be recovered by civil action in the proper Circuit or District Court of the United States.

The penalty provided in Section 3 of the Act here involved does not follow as the result of the commission of a crime but is a mere sanction to enforce an obligation validly imposed by Congress. Even if it be conceded that this statute is penal in nature, it is submitted that it would not be subject to the same strict rules of construction as apply to criminal statutes.

II

The Preponderant Authority Is to the Effect That a Carrier Who, With Full Knowledge of the Facts, Negligently Fails to Unload Within the Statutory Period Is Subject to the Penalty.

Although "wilfully" as used in the Act has been given different definitions, the majority of the cases have penalized a connecting carrier for overconfinement of animals where it had knowledge of the facts and was not prevented from unloading because of accidental or unavoidable causes. It is contended that construing "wilfully" as equivalent to "negligently" is not inconsistent with the decisions in these cases.

In *United States* v. *Atantic Coast Line Railroad Company, supra,* the facts were similar to the instant case. An employee of defendant having knowledge of the time of confinement failed to

call the attention of another employee to the fact that one of the cars contained cattle and, owing to this failure, that car was not promptly forwarded and delivered, with the result that the animals were confined longer than the statutory period. The court held that "negligence" was no defense, stating, p. 769:

> It is well settled that a corporation can only act through its agents, and, such being the case, it necessarily follows that a lack of foresight and due diligence on the part of those acting as agents in complying with the statute is negligence. Therefore, in this instance, we think the corporation has, within the meaning of the statute, "knowingly" and "wilfully" failed to comply with the law, notwithstanding the fact that there may have been no evil motive or intent in the transaction. In other words, we think a negligent failure to comply with the law, with a knowledge of facts as shown in this instance, is wilfull failure.

Similarly in *Montana Central Railway Company* v. *United States,* 164 Fed. 400, (C. C. A. 9th), the Circuit Court of Appeals upheld the lower court in sustaining the Government's demurrer to the answer filed by the carrier setting forth an affirmative defense of *negligence,* holding that allegations of "oversight, forgetfulness, and unintentional neglect" of the employees expressly negatived the claim that failure to rest, feed and water the ani-

mals within the statutory period was not the result of knowledge and wilfullness on the part of the carrier. In other words, "negligence" was no defense.

In *Oregon-Washington Railroad & Navigation Company* v. *United States,* 205 Fed. 337 (C. C. A. 9th), the appellant placed a car of swine at an unloading chute in its yards at destination, but not at the regular unloading pens of the consignee and, receiving assurance from the caretaker of the animals that the consignee thereof had promised to unload them, left them there without unloading until after the statutory period had expired. The court held that the *negligence* of the defendant in failing to see that the swine were unloaded, notwithstanding the assurance received, was evidence of indifference to the statutory requirements sufficient to go to the jury. Cf. *St. Joseph Stockyards Company* v. *United States,* 187 Fed. 104, (C. C. A. 8th); *Southern Pacific Co.* v. *United States,* 171 Fed. 360 (C. C. A. 9th); *United States* v. *Stockyards Terminal Railway Company,* 178 Fed. 19, (C. C. A. 8th); *New York Central H. R. Railroad Co.* v. *United States* 203 Fed. 953 (C. C. A. 2d).

Mr. Justice Van Devanter, while a member of the Circuit Court of Appeals for the Eighth Circuit stated in the case of *St. Louis & S. F. R. Co.* v. *United States,* 169 Fed. 69 (C. C. A. 8th), that:

> "Willfully" means something not expressed by "knowingly" else both would not be used

> conjunctively. And presumptively it means something not expressed by "willingly," else the change from that word would not have been made when the old statute (Rev. Stat. §§ 4386–4390) was being reenacted. * * * But it does not mean with intent to injure the cattle or to inflict loss upon the owner because such intent on the part of a carrier is hardly within the pale of actual experience or reasonable supposition. *United States* v. *Union Pacific R. R. Co., supra.* So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.

While the language of this definition appears unnecessarily strict, the language in *United States* v. *Union Pacific Railroad,* 169 Fed. 65 (C. C. A. 8th), cited in the above quotation shows the application intended by that court. In the latter case, the defendant contended that "wilfully" implies an evil purpose or bad motive and submitted that this was absent, even though it knowingly failed to unload the animals because prevented from so doing by the press of unusual business. The court stated, p. 68:

> The answer admits that the defendant *knowingly—that is, intentionally*—kept the live stock confined in cars without unloading for more than 28 hours, and did this merely be-

> cause of a great and unusual press of business as there stated. This in our opinion is an admission that it was willfully done within the true meaning of the statute. Otherwise we must concede, which we cannot do, that a mere press of business justifies a disregard of the law.

The court concluded that the great and unusual press of business described in the answer did not, as a matter of law, amount to an accidental or unavoidable cause which could not have been anticipated by the exercise of due diligence.

Thus, the Eighth Circuit Court of Appeals in the two cases mentioned above seems clearly to have adopted the view that a carrier having knowledge of the facts who fails to sustain the burden set forth in Section 1, "that it was prevented from unloading as a result of accidental or unavoidable cause which could not have been anticipated or avoided by the exercise of due diligence and foresight," is guilty of a violation of the Act and may be penalized under Section 3. It follows that negligence of a carrier, with knowledge of the facts, which gives no exemption under Section 1, is no defense to an action based on Section 3.

Furthermore, it has been held that a carrier that has over-confined cattle as a result of a breakdown "must show that the breakdown did not result from a cause which due diligence and foresight would have anticipated and avoided." *United States* v. *Southern Pacific Co.*, 157 Fed. 459, 461 (N. D.

Calif.). It seems clear that since the carrier that makes every effort to unload animals within the statutory period, but miscalculates its ability and is prevented from so doing by traffic congestion or by accidents due to its own negligence is liable to the penalty, the carrier that forgets to unload them should also be liable.

The exceptions to the proposition stated above are the cases of *United States* v. *Lehigh Valley Railroad Company,* 204 Fed. 705 (C. C. A. 3d), and *United States* v. *Southern Railway Company,* 1 F. (2d) 607 (E. D. Tenn.). In *United States* v. *Lehigh Valley Railroad Company, supra,* the Circuit Court of Appeals for the Third Circuit held that "wilfull" means something more than negligence, which view was supported by *United States* v. *Southern Railway Company, supra.*

Whatever the conflict in the lower courts, we believe the entire question as to whether negligence of the carrier with full knowledge of the facts constitutes wilfullness within the meaning of this statute has been settled by this Court in *Chicago & N. W. Ry. Co.* v. *United States,* 246 U. S. 512. While holding that the overconfinement was caused by accident, nevertheless this Court in discussing the diligence and foresight to be exercised by the carrier in order to avoid the penalty said at p. 518:

> Thereafter the duty is on the carrier to exercise the diligence and foresight which

> prudent men, experienced in such matters, would adopt to prevent accidents and delays and to overcome the effect of any which may happen—with an honest purpose always to secure unloading within the lawful period. If, notwithstanding all this, unloading is actually prevented by storm or accident the reasonable delay must be excused.

In stating that diligence and foresight must be exercised to overcome the effects of an accident, this Court seems clearly to have viewed negligence as an insufficient defense.

It is submitted that the admitted negligence in this case is not that standard of diligence and foresight which this Court has laid down as the norm for delay which is excusable.

The court below states that the current of authority supports its construction that "wilfully" means "deliberate" and "with conscious purpose." While it is true there is a conflict, a number of the decisions cited by the court below do not support its conclusion. In *Oregon-Washington Railroad & Navigation Company* v. *United States,* 205 Fed. 337 (C. C. A. 9th), *supra,* where the facts were substantially the same as in the instant case, the court held that they were indicative of a violation of the Act. In *Chicago, Burlington & Quincy Railroad* v. *United States,* 194 Fed. 342 (C. C. A. 8th), there was no evidence of negligence. In *St. Joseph Stockyards Company* v. *United States,* 187 Fed. 104, (C. C. A. 8th), the question of negligence was

not involved. In *St. Louis & Santa Fe Railway Company* v. *United States, supra,* and in *Merchants Bridge Terminal Railway Company* v. *United States,* 209 Fed. 600 (C. C. A. 7th), it was held that there was not sufficient evidence to support the finding of lack of diligence on the part of the carrier. *United States* v. *Boston & Maine Railroad Company,* 84 F. (2d) 365 (C. C. A. 1st), was decided on a procedural question.[a]

As a matter of fact, practically all the violations of the Twenty-eight Hour Law are due, in the final analysis, to negligence in one form or another of railroad employees, rather than to any deliberate purpose to violate the Act.

In *United States* v. *Union Pacific Railroad Company, supra,* the court stated, p. 68:

> It can hardly be conceived that any reputable carrier would deliberately and designedly because of ill will or other malevolent feeling towards the dumb animals or their owners fail to conform to the reasonable and humane requirement of the law. If the law

[a]This case was presented to the District Court on an agreed statement of facts but no request was made for findings of fact. The Circuit Court of Appeals, therefore, did not consider the merits of the case, but dismissed it on the ground that the agreed facts did not contain all the facts essential to a judgment, and finding of an ultimate fact one way or another was required for its justification. Judge Morton in a concurring opinion stated that the rule is too artificial. Since the court in the instant case made findings of fact and conclusions of law, this case has no bearing on the question under consideration.

be operative only to restrain the possible exercise of such evil and perverse disposition, it would have little, if any, scope of operation. The real purpose of the legislation in our opinion was to alleviate the condition of dumb animals in transit. The desire to curtail expense and promote economy of operation naturally encourages indifference to if not a disregard of every impediment to quick and cheap transportation. The act of June 29, 1906, we think, was aimed at this natural propensity, and is a condemnation of indifferent more than malevolent conduct. So far as the dumb animals are concerned, the effect is the same in either case. They would suffer just as much if deprived of rest, water, and food by indifference of the carrier as they would by his malevolence. The meaning we ascribe to the word "willfully" gives a reasonable scope of operation to the act, while the meaning contended for by defendant's counsel practically nullifies it.

The foregoing reasoning applies to conduct which reflects negligence as well as to that which reflects indifference. If negligence alone will be sufficient to escape the sanctions of the Act, the major incentive toward humane care of animals in transit will have been lost.

CONCLUSION

We respectfully submit, for the reasons set forth, at the judgment of the court below should be reversed.

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January, 1938.

APPENDIX

The Cruelty to Animals Act, as incorporated in United States Code, Title 45, Sections 71–73, Act of June 29, 1906, c. 3594, Secs. 1–4, 34 Stat. 607, as amended.

SECTION 71. No railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens, for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: *Provided,* That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of

confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this chapter to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided,* That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

SECTION 72. Animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section 71 of this chapter, but nothing in this section

shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

SECTION 73. Any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than $100 nor more than $500: *Provided,* That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

SECTION 74. The penalty created by the preceding section shall be recovered by civil action in the name of the United States in the district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States Attorneys to prosecute all violations of this chapter reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

Act of March 3, 1873, c. 252, Secs. 1–4, 17 Stat. 584, 585:

CHAP. CCLII. An Act to prevent Cruelty to Animals while in Transit by Railroad or other means of Transportation within the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no

railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State to another, shall confine the same in cars, boats, or vessels of any description, for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated. Animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in case of his default in so doing then by the railroad company or owners or masters of boats or vessels transporting the same at the expense of said owner or person in custody thereof; and said company, owners, or masters shall in such cases have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals authorized by this act. Any company, owner, or custodian of such animals, who shall knowingly and willfully fail to comply with the provisions of this act shall, for each and every such failure to comply with the provisions of this act, be liable for

and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: *Provided, however,* That when animals shall be carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity for rest, the foregoing provisions in regard to their being unloaded shall not apply.

SEC. 2. That the penalty created by the first section of this act shall be recovered by civil action in the name of the United States, in the circuit or district court of the United States holden within the district where the violation of this act may have been committed; or the person or corporation resides or carries on its business; and it shall be the duty of all United States marshals, their deputies and subordinates, to prosecute all violations of this act which shall come to their notice or knowledge.

SEC. 3. That any person or corporation entitled to lien under the first section of this act may enforce the same by a petition filed in the district court of the United States holden within the district where the food, care, and custody shall have been furnished, or the owner or custodian of the property resides; and said court shall have power to issue all suitable process for the enforcement of such lien by sale or otherwise, and to compel the payment of all costs, penalties, charges, and expenses of proceedings under this act.

SEC. 4. That this act shall not go into effect until the first day of October, eighteen hundred and seventy-two.

Approved, March 3, 1873.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937.

No. 352

UNITED STATES OF AMERICA,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
A CORPORATION.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF IN OPPOSITION TO APPLICATION TO GRANT WRIT OF CERTIORARI.

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF IN OPPOSITION TO APPLICATION TO GRANT WRIT OF CERTIORARI.

May It Please the Court:

The opinion of the Circuit Court of Appeals, reported in *90 F. (2d) 213*, does not involve any new or unusual point of law, nor place any new construction on the statute involved, nor does it involve any proposition of law which can be seriously controverted.

There is involved here only the application of the Cruelty to Animals Act of June 29, 1906, Sections 1, 3 and 4, as amended, *(U. S. C., Title 45, Sections 71, 73, 74)*,

where the confinement of the animals beyond the statutory period is admitted and the cause for the confinement has been stipulated, a jury waived, and the case submitted to the Court on an agreed statement of fact.

The Court was called upon to determine, and did determine, whether or not the confinement of the cattle was "*knowing and wilful*" within the intendment of the statute. The Court found that there was no knowledge or wilfulness and that the Railroad Company "attempted, in good faith, to comply with the statutory requirement to unload the cattle within the statutory period". (R. 22).

The question of law presented is, therefore, not as recited by the petitioner in its brief, whether in an action for a penalty under the Cruelty to Animals Act the carrier can escape the penalty by showing that its default was due to the negligent oversight of one of its employees, but the question is whether, in such a suit, the United States can recover the penalty prescribed for the "knowing and wilful" violation of that statute, without some showing that the action of the Railroad Company in confining the animals beyond the statutory period was "knowing and wilful".

Furthermore, in this case there is a preliminary question to be examined. A jury having been waived the case was submitted to the Court for determination on an agreed statement of fact which did not require a verdict either way. The ultimate fact necessary to liability under the terms of the statute, whether or not the confinement of the animals in the car more than thirty-six hours was the result of an act knowingly and wilfully done by the

Railroad Company, was left to the determination of the Court.

The pertinent facts which appear in the stipulation of facts and waiver of trial by jury, which was filed in the District Court, and on which the case was submitted (R. 11), are that the car was loaded with cattle at Hermanville, Mississippi, at 3 P. M. on October 8, 1932, and shipped to New Orleans, Louisiana, with a thirty-six hour release signed by the shipper (R. 12); that this car arrived at Stuyvesant Stock Yards at 11:35 P. M. on October 9, 1932, with two other cars of cattle (R. 13); that the night general yard master received advance information from the Railroad Company's dispatcher at McComb of the approximate time of arrival of these three cars and when the period of confinement for the cattle would expire; that because of the necessity of prompt handling of the cattle and the improbability of handling it within the statutory period on a regular train, the night general yard master procured an extra engine which was in waiting for the arrival of the cars of cattle; that these cars were immediately switched and placed in the Crescent City Stock Yards for delivery at 2:50 A. M. on October 10, 1932, at which time the period allowed for the confinement of the cattle had not elapsed, and the car containing the cattle was placed for unloading within said period of time (R. 13-14); but the night general yard master, whose duty it was to do so, failed to notify the employee of the Illinois Central Railroad, whose duty it was to unload the car, that the cattle car was to be placed for delivery in the early hours of the morning, and because of this failure, the car was not unloaded until 4 A. M. on the morning of Octo-

ber 10, 1932, resulting in confinement of the cattle for thirty-seven hours.

This agreed statement of fact contains all the facts necessary to the determination of the case, except the ultimate fact whether or not the confinement of the cattle in the car was "knowing and wilful", and this ultimate fact the District Judge resolved in favor of the Railroad Company, and found that it "attempted, in good faith, to comply with the statutory requirement to unload the cattle within the statutory period". (R. 22).

The identical situation was presented to the First Circuit Court of Appeals in the case of *United States v. Boston & M. R. R., 84 F. (2d) 365*, a suit by the United States against the Boston & M. R. R. for a penalty for confining sheep in cars longer than permitted by the Cruelty to Animals Act. There too the case was submitted to the District Judge on an agreed statement of fact which omitted an admission of the ultimate fact necessary to liability under the terms of the statute, that is whether or not the confinement of the sheep in the cars more than thirty-six hours was the result of an act knowingly and wilfully done by the carrier. The District Judge found that the facts stipulated "did not establish a wilfull disregard of the statute" and ordered that judgment be rendered for the defendant. Affirming the District Court's judgment, the Court of Appeals said:

> "Although, according to the agreed facts, the defendant knew, or ought to have known, that its conduct might result in violations of the statute, the agreed facts did not include a finding of the ultimate fact essential to the imposition of a penalty,

viz., that the acts complained of were willful violations of the statute. Whether the defendant's conduct was willful or not was for the trial court to determine as an inference of fact from the agreed facts; they being all the evidence in the case from which the conclusion could be drawn.

"* * * * * *

"When the agreed facts contain all the facts essential to a judgment for one party or the other, then an appeal from such a judgment raises the question whether the facts agreed upon were sufficient to support the judgment; and this is so irrespective of whether an exception was taken to the judgment or not, for, in such case, the error, if one exists, appears upon the record proper and no exception is necessary. Sanfeliz v. Bank (C. C. A.) 74 F. (2d) 338, 340. But in this case the facts agreed upon do not contain all the facts essential to a judgment, and a finding of an ultimate fact one way or the other was required for its justification. This being so, an exception to the judgment on the ground that the agreed facts presented only a question of law could avail nothing, as the agreed facts alone do not require a verdict either way. United States v. Smith, supra."

Accordingly, we submit that there is not presented here any question of law for this Honorable Court to review.

However, if there is any question of law presented, then we submit that it is whether, in a suit for a penalty under the Cruelty to Animals Act, the United States can recover the penalty for the knowing and wilful violation of that statute, without some showing that the action of the Railroad Company in confining the animals beyond the

statutory period was knowing and wilful. The opinion of the Fifth Circuit Court of Appeals in effect requires such a showing and disposes of that question correctly and construes the Cruelty to Animals Act as it has been onstrued by the First, Third, Sixth, Seventh, Eighth and Ninth Circuit Courts of Appeal.

The petitioner is contending for a construction of the statute which would emasculate the words "knowingly and wilfully" from Section 3 thereof and would have the Courts enforce the penalty provided by the statute for its knowing and wilful violation, even in those cases where no knowledge or wilfulness is shown. As stated by Judge Hutcheson in the opinion of the Fifth Circuit Court of Appeals:

> "To take appellant's view we should have to disregard the settled meaning of the words 'knowing and wilful' when used in penalty and criminal statutes. To take that view we should have to assume that Congress in section 3 idly used two words of known and settled legal meaning, intending that the section should be read as though they were not in it. To take that view we should have to close our eyes to the obvious distinction which Congress plainly intended and aptly made by the use of the words in question, between the duty to unload unless prevented by causes beyond its control, imposed upon the carrier by section 1, and the liability for penalties imposed upon it by section 3 for knowingly and wilfully failing to perform the imposed duty."

To give to the statute the construction urged by the United States would do violence to the rule of statutory construction that no words appearing in a statute

shall be treated as surplusage and that effect shall be given to every clause and part.

In *Platt v. Union Pacific R. R. Co., 99 U. S. 48, 58,* the Court said:

> "But the admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute. In Commonwealth v. Alger (7 Cush. (Mass.) 53-89), it was said that in putting a construction upon any statute every part must be regarded, and it must be so expounded, if practicable, as to give some effect to every part of it. So, in People v. Burns (5 Mich. 114), it was held that some meaning, if possible, must be given to every word in a statute, and that where a given construction would make a word redundant, it was reason for rejecting it. To the same effect is Dearborn and Others v. Inhabitants of Brookline (97 Mass. 466); and in Gates v. Salmon (35 Cal. 576) it was ruled that no words are to be treated as surplusage or as repetition."

In *Montclair v. Ramsdell, 107 U. S. 147, 152,* the Court said:

> "It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."

In *Ginsberg & Sons v. Popkin, 285 U. S. 204, 208,* the Court said:

> "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in an-

other part of the same enactment. United States v. Chase, 135 U. S. 255, 260. Specific terms prevail over the general in the same or another statute which otherwise might be controlling. Kepner v. United States, 195 U. S. 100, 125. In re Hassenbusch, 108 Fed. 38. United States v. Peters, 166 Fed. 613, 615. The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute. Market Co. v. Hoffman, 101 U. S. 112, 115. Ex parte Public National Bank, 278 U. S. 101, 104."

The principle of law that in statutory construction no words are to be treated as surplusage and that effect shall be given to every clause and part of a statute, is so well settled that further citation of authorities appears unnecessary.

Why should the words "knowingly and wilfully" found in Section 3 of the act, which imposes a penalty for its violation, be disregarded? True, Section 1 of the Act declares a rail carrier shall in no event keep cattle confined in a car beyond thirty-six hours without unloading them for rest, water and feeding, unless prevented by storm or other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight, but Congress has not seen fit to penalize a carrier who does so, unless the carrier violates the statute knowingly and wilfully. It is not for the United States attorneys or for the courts to say that the inclusion by Congress of the provision that the act must be knowingly and wilfully committed before the penalty can be inflicted is just or unjust or proper or improper.

In *Rice v. The Minnesota & North Western Railroad Co., 1 Black 360, 379*, the Court said:

> "Whether the provision be just or unjust, the words mentioned are a part of the act, and it is not competent for this court to reject or disregard a material part of an act of Congress, unless it be so clearly repugnant to the residue of the act that the whole cannot stand together."

Inclusion of the words "knowingly and wilfully" in Section 3 of the Act does not make that Section repugnant to the provisions of Section 1. By Section 1 of the Act, Congress announced a standard of conduct for carriers in the transportation of cattle and provided that rail carriers should be required to unload cattle for a period of five consecutive hours for rest, water and feeding, unless prevented by storm or other accidental or unavoidable causes which the carrier could not anticipate or avoid by the exercise of due diligence and foresight. Any carrier who accidentally or negligently fails to measure up to this standard of conduct thereby renders itself liable in a civil suit for damages to any shipper or consignee who has been damaged by its negligence, but does not render itself liable for the penalty prescribed by Section 3 of the Act, unless the violation has been knowing and wilful.

On page six of the petition, the petitioner alleges that the decision of the Fifth Circuit Court of Appeals is squarely in conflict with the decisions of the Circuit Court of Appeals for the Fourth Circuit in the case of *United States v. Atlantic Coast Line Railroad, 173 Fed. 764*, and the Circuit Court of Appeals for the Ninth Circuit in the cases of *Montana Cent. Ry. Company v. United States, 164 Fed. 400,*

and *Oregon-Washington R. & Nav. Co. v. United States, 205 Fed. 337*, and that the decision appears to be in conflict with that of the Circuit Court of Appeals for the Eighth Circuit in *United States v. Union Pac. R. Co., 169 Fed. 65 (C. C. A. 8th)*.

We take issue with the petitioner on this assertion.

In the case of *United States v. Union Pac. R. Co.*, the defendant pled that unusual press of business required the Railroad Company to confine the animals in the car beyond the statutory period, and that its action was not knowing and wilful within the meaning of the statute. The United States challenged the sufficiency of this answer as a defense by a demurrer, which was sustained by the District Court. The Eighth Circuit Court of Appeals reversed the decision of the District Court and ordered the demurrer overruled, thereby holding in effect that press of business was not a sufficient defense as a matter of law. Nevertheless, the organ of the Court, Judge Adams, recognized specifically "that Section 1 creates a duty to be performed by carriers and that *Section 3 imposes a penalty not for the failure to perform the duty, but only when the carrier 'knowingly and wilfully' fails in that regard.*" (Italics ours).

This was recognized and stressed by Mr. Justice Van Devanter when he sat as Circuit Judge in the Eighth Circuit Court of Appeals, in a later case in that Circuit involving the construction of the Cruelty to Animals Act, *St. Louis & S. F. R. Co. v. United States, 169 Fed. 69*, in which he said as organ of the Court:

> "It will be assumed, but without so deciding, that the statute is directed not merely against the continuous

> confinement of cattle in cars beyond the prescribed period of 28 or 36 hours, as the case may be, without rest, water, or food, but also against unloading them for rest, water, and feeding into pens not properly equipped therefor, that the pen into which these cattle were unloaded was not properly equipped in the sense of the statute, and that ordinarily to unload cattle into such a pen for rest, water, and feeding is to fail to comply with the statute; and, with these matters so disposed of, *we will consider only whether there was any substantial evidence from which the jury reasonably could have found that the defendant knowingly and wilfully failed to comply with the statute in this instance.* We say 'knowingly and wilfully' because, as was recently said by Judge Adams in speaking for this Court, 'it appears that section 1 creates a duty to be performed by carriers, and that section 3 imposes a penalty not for the failure to perform the duty, but only when the carrier "knowingly and willfully" fails in that regard.' United States v. Union Pacific R. R. Co. (C. C. A.) 169 Fed. 65. *The qualifying words cannot be disregarded. They mean something, and whatever that may be is an essential element of every right to the penalty.*" (Italics ours).

We, therefore, submit that there was nothing in the earlier case in the Eighth Circuit of *United States v. Union Pacific R. Co.* that was in any way in conflict with the decision of the Fifth Circuit Court of Appeals in this case, and that the later case in the Eighth Circuit, *St. Louis & S. F. R. Co. v. United States*, supports the decision of the Fifth Circuit Court of Appeals in this case.

Passing now to the Ninth Circuit, it is a fact that the earlier case of *Montana Central Ry. Co. v. United States, 164 Fed. 400*, does support the interpretation of the

statute for which the United States is contending. However, that decision was overruled by the later case in the same Circuit of *Oregon-Washington R. & Nav. Co. v. United States, 205 Fed. 337*, which not only is not in conflict with the decision of the Fifth Circuit Court of Appeals, as alleged by the petitioner, but actually supports the decision of the Fifth Circuit Court of Appeals. We quote the pertinent language from the *Oregon-Washington R. & Nav. Co. v. United States*, on which we rely:

> "The carrier who knowingly and willfully fails to comply with the provisions of the act is amenable thereto, *and in the present case it was incumbent upon the government to show by testimony sufficient to go to the jury that the defendant did so knowingly and willfully* fail to unload the hogs within the period of 36 hours. *The words 'knowingly and willfully,' as employed in the act, have been many times construed and their meaning determined. 'Knowingly' signifies 'with a knowledge of the facts which, taken together, constitute the failure to comply with the statute'; and 'willfully' means 'purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements'.* Such is the interpretation given by Mr. Justice Van DeVanter while a member of the Circuit Court of Appeals of the Eighth Circuit. St. Louis & S. F. R. Co. v. United States, 169 Fed. 69, 71, 94 C. C. A. 437, 439." (Italics ours).

Accordingly, we submit that it is only in the jurisprudence of the Fourth Circuit that the interpretation of the statute sought by the United States finds any support, and then only in the early case of *United States v. Atlantic Coast Line R. Co., 173 Fed. 764*, which is wholly inconsist-

ent with the later jurisprudence in the other circuits construing the same statute.

In a note at the bottom of page eight of the petition, the petitioner observes that a number of decisions cited by the Circuit Court of Appeals for the Fifth Circuit do not support its conclusion, and comments on the cases of *Oregon-Washington Railroad & Nav. Co. v. United States*, (9th C. C. A.), 205 Fed. 337; *Chicago, B. and Q. R. R. v. United States*, (8th C. C. A.), 194 Fed. 342; *St. Joseph Stockyards Co. v. United States*, (8th C. C. A. 1911), 187 Fed. 104; *United States v. Boston & M. R. R. Co.*, (1st C. C. A.), 84 F. (2d) 365; *St. Louis & S. F. R. Co. v. United States*, (8th C. C. A.), 169 Fed. 69; and *St Louis Merchants Bridge Terminal Ry. Co. v. United States*, (7th C. C. A.), 209 Fed. 600. We submit that every one of these decisions supports that of the Fifth Circuit Court of Appeals in this case.

The quotation, *supra*, from *Oregon-Washington Railroad & Nav. Co. v. United States* demonstrates plainly that this decision amply supports that of the Fifth Circuit Court of Appeals in this case. Furthermore the facts involved in that case are not substantially the same as in the instant case, as asserted by the petitioner. In the *Oregon-Washington Railroad & Nav. Co. v. United States* case, the Railroad Company did not make any endeavor to have the cattle unloaded, but relied on the statement of the shipper's caretaker who accompanied the cattle that he would see that this was done, thereby attempting to delegate its duty to the shipper, and that case having been submitted to the jury there resulted a verdict in favor of the United

States. In the last analysis, the case simply stands for the proposition that the question of knowledge and wilfulness it to be determined by a jury from the evidence. The fact that the jury in that case found in favor of the United States on the facts involved, does not result in the case being contrary to the one here under consideration, where the facts are different and where the Railroad Company did not undertake to delegate its duty of unloading to the shipper.

True, in *Chicago, B. and Q. R. R. v. United States, 194 Fed. 342*, the Court found that there was no evidence of negligence, but the case is in point and supports the decision of the Fifth Circuit Court of Appeals in this case, in that it holds that the violation of the Cruelty to Animals Act must be knowing and wilful before the penalty prescribed by that act for its violation can be collected. Defining "wilful" the Court said:

> "'Wilfully' means 'purposely or obstinately, and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements'. St. Louis & S. F. Ry Co. v. United States, 169 Fed. 69, 71, 94 C. C. A. 437. There is no proof of any such attitude on the part of this carrier".

St. Joseph Stockyards Co. v. United States (8th C. C. A.), 187 Fed. 104, also amply supports the decision of the Fifth Circuit Court of Appeals. We quote from *St. Joseph Stockyards Co. v. United States* case, as follows:

> "This court has often had occasion to consider the 28-hour law, and from its previous decisions these conclusions may be safely drawn. Section 1 of this statute imposes upon every railroad

company carrying cattle from one state to another the duty to unload them for rest, water, and feeding once in 28 hours, in the absence of a request for an extension of this time to 36 hours; *and section 3 of the act imposes penalties for which these judgments were rendered, not for a failure to discharge the duty prescribed by section 1, but for 'knowingly and willfully' failing to discharge it.* United States v. Union Pacific R. Co., 94 C. C. A. 433, 434, 169 Fed. 65, 66.

"The words 'knowingly and willfully' in this statute have significance, and in the enforcement of it they must have effect. 'Knowingly' evidently means with a knowledge of the facts which, taken together, constitute the failure to comply with the statute, as is the case where one carrier receives from another a car loaded with cattle, and, with knowledge of how long they then had been confined in the car without rest, water, or food, prolongs the confinement until the statutory limit is exceeded. * * * *'Willfully' means purposely or obstinately, and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.'* St. Louis & S. F. R. Co. v. United, 94 C. C. A. 437, 439, 169 Fed. 69, 71; United States v. Sioux City Stockyards Co. (C. C.) 162 Fed. 556, 560, 562; United States v. Stockyards Terminal Co. (C. C.) 172 Fed. 452; New York Central & H. R. R. Co. v. United States, 165 Fed. 833, 841, 91 C. C. A. 519, 527." (Italics ours).

True, *United States v. Boston & M. R. R. Co., 84 F. (2d) 365*, was decided on a procedural question, and we have cited it above in support of the very same procedural question, which we have raised in this case. Nevertheless, the inference to be drawn from the case is that before the penalty prescribed by the Cruelty to Animals Act for its

violation can be enforced, there must be evidence from which the Court or the jury can infer knowledge and wilfulness. Likewise, the decision in *St. Louis & S. F. R. Co. v. United States, 169 Fed. 69*, amply supports the decision of the Fifth Circuit Court of Appeals. We quote from the *St. Louis & S. F. R. Co. v. United States* case, as follows:

> "It will be assumed, but without so deciding, that the statute is directed not merely against the continuous confinement of cattle in cars beyond the prescribed period of 28 or 36 hours, as the case may be, without rest, water, or food, but also against unloading them for rest, water, and feeding into pens not properly equipped therefor, that the pen into which these cattle were unloaded was not properly equipped in the sense of the statute, and that ordinarily to unload cattle into such a pen for rest, water, and feeding is to fail to comply with the statute; and, with these matters so disposed of, we will consider only whether there was any substantial evidence from which the jury reasonably could have found that the defendant knowingly and willfully failed to comply with the statute in this instance. We say 'knowingly and wilfully' because, as was recently said by Judge Adams in speaking for this court, 'it appears that section 1 creates a duty to be performed by carriers, and that section 3 imposes a penalty not for the failure to perform the duty, but only when the carrier "knowingly and willfully" fails in that regard'. United States v. Union Pacific R. R. Co. (C. C. A.) 169 Fed. 65. The qualifying words cannot be disregarded. They mean something, and whatever that may be is an essential element of every right to the penalty. 'Knowingly' evidently means with a knowledge of the facts which taken together constitute the failure to comply with the statute, as is the case where one carrier receives from another a car loaded with cattle, and,

with knowledge of how long they then had been confined in the car without rest, water, or food, prolongs the confinement until the statutory limit is exceeded. 'Willfully' means something not expressed by 'knowingly', else both would not be used conjunctively. And presumptively it means something not expressed by 'willingly', else the change from that word would not have been made when the old statute (Rev. St. Sections 4386-4390 (U. S. Comp. St. 1901, pp. 2995-2997)) was being re-enacted. Crawford v. Burke, 195 U. S. 176, 190, 25 Sup. Ct. 9, 49 L. Ed. 147; Hopper v. Denver, etc., Co., 84 C. C. A. 21, 24, 155 Fed. 273, 276. But it does not mean with intent to injure the cattle or to inflict loss upon their owner because such intent on the part of a carrier is hardly within the pale of actual experience or reasonable supposition. United States v. Union Pacific R. R. Co., supra. So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."

St. Louis Merchants Bridge Terminal Ry. Co. v. United States, (7th C. C. A.), 209 Fed. 600, also clearly supports the decision of the Fifth Circuit Court of Appeals. We quote from the *Merchants Bridge Terminal Ry. Co.* case, as follows:

"The declaration charges, as the statute requires, that plaintiff in error 'knowingly and willfully confined' said stock in said cars for a longer period than that permitted by the statute. As was said by the United States Circuit Court of Appeals for the Eighth Circuit in C. B. & Q. Ry. Co. v. United States, 194 Fed. 342, 114 C. C. A. 334:

" 'Wilfully' means purposely or obstinately, and is designed to describe the attitude of a carrier

> who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."

We submit that the weight of the well settled jurisprudence in the First, Third, Sixth, Seventh, Eighth and Ninth Circuit Courts of Appeal is to the effect that in a suit by the United States for a penalty for violating the Cruelty to Animals Act, it is incumbent upon the United States to make some showing of knowledge and wilfulness, and cite in support thereof the following cases:

First Circuit.

United States v. Boston & M. R. R., (C. C. A. 1936), 84 F. (2d) 365.

Third Circuit.

United States v. Lehigh Valley R. Co., (C. C. A. 1913), 204 Fed. 705;

United States v. Philadelphia & R. Ry. Co., (D. C. E. D. Pa. 1915), 223 Fed. 214.

Sixth Circuit.

United States v. Southern Ry. Co., (D. C. E. D. Tenn. N. D. 1923), 1 F. (2d) 607.

Seventh Circuit.

St. Louis Merchants' Bridge Terminal Ry. Co. v. United States, (C. C. A. 1913), 209 Fed. 600.

Eighth Circuit.

United States v. Union Pacific Ry. Co., (C. C. A. 1909), 169 Fed. 65;

St. Louis & S. F. R. Co. v. United States, (C. C. A. 1909), 169 Fed. 69;

United States v. Stockyards Terminal Ry. Co. (C. C. A. 1910), 178 Fed. 19;

St. Joseph Stockyards Co. v. United States, (C. C. A. 1911), 187 Fed. 104; and

United States v. Sioux City Stock Yards Co., (C. C. N. D. Iowa W. D. 1908), 162 Fed. 556.

Ninth Circuit.

Oregon-Washington R. & Nav. Co. v. U. S. (C. C. A. 1913), 205 Fed. 337.

We further submit that, as Judge Hutcheson has said in his opinion, *90 F. (2d) 213, 215*, "the word 'wilfully' when used in statutes of this kind, has the well-defined meaning of deliberate and conscious purpose. It gives effect to the view that statutes in which it is found subject to penalty or punishment only those who deliberately and consciously, that is, with set purpose, do what they are forbidden by the statutes to do. Under that view such statutes do not subject to penalties those who, though they violate them, do so unintentionally through oversight, or simple negligence".

Accordingly, we submit that if there is any question of law involved here, the decision of the United States Circuit Court of Appeals for the Fifth Circuit in this case disposes of it correctly and in uniformity with the well settled jurisprudence of the Circuit Courts of Appeal, and that this case is not of such a character as to justify this Court

in granting a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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New Orleans, Louisiana,
September 15th, 1937.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 352

UNITED STATES OF AMERICA,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
A CORPORATION.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 352

UNITED STATES OF AMERICA,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY, A CORPORATION.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

Opinions Below.

The District Court's findings of fact and conclusions of law appear at R. 22-24. The opinion of the Circuit Court of Appeals appears at R. 52-56, and is reported in *90 F. (2d) 213.*

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered May 26, 1937. (R. 56). The petition for writ of

certiorari was filed August 26, 1937, and granted October 11, 1937 (R. 57). The United States invoked the jurisdiction of this Court under *Section 240 (a) of the Judicial Code*, as amended by the Act of February 13, 1925.

Question Presented.

Whether in an action for penalties under the Cruelty to Animals Act of June 29, 1906, *Sections 1, 3 and 4, (U. S. C., Title 45, Sections 71, 73 and 74)*, the Government is entitled to recover the penalty imposed by Section 3 of the Act on those who "knowingly and wilfully" fail to comply with its provisions, without any showing of knowledge and wilfullness.

Statement.

Since the statement of the case contained in the Government's brief omits certain matter which, in our opinion, is pertinent to our contentions, we restate the case.

The petition (R. 2) alleges that the respondent "knowingly and wilfully" confined cattle in a car for 37 hours without unloading them for rest, water and feeding, on an interstate journey between Hermanville, Mississippi and New Orleans, Louisiana. While respondent admitted the confinement of the cattle in its answer (R. 5), it denied that it confined the cattle "knowingly and wilfully", and directly put at issue the allegation of knowledge and wilfullness. The answer alleged affirmatively that the confinement was the result of the negligent oversight of respondent's Night General Yardmaster at New Orleans, who had been advised by telegraph of the approximate time of the arrival of this car of cattle and when the legal confinement period would expire; that because of the improb-

ability of the car being handled on regular trains (so as to reach destination before the expiration of the legal confinement period), he had an extra engine and crew awaiting the arrival of the car at New Orleans, had it switched immediately and placed for unloading in the Crescent City Stock Yard prior to the expiration of the 36 hour period; that nevertheless, through oversight, he neglected to notify the employee whose duty it was to unload the cattle to do so, and that this oversight resulted in the cattle being confined in the cars one hour over the permissible period.

Petitioner moved for a judgment on the petition and answer (R. 9) which was overruled (R. 10), and the case was set down for trial on the merits.

The parties then stipulated certain evidentiary facts and waived trial by jury (R. 11). It was stipulated, among other things, that the car was loaded with cattle at Hermanville, Mississippi at 3:00 P. M. on October 8, 1932 and shipped to New Orleans, Louisiana, with a 36 hour release signed by the shipper (R. 12); that the car arrived at the Stuyvesant Dock Yards(*) of respondent in New Orleans at 11:35 P. M. on October 9, 1932, with two other cars of cattle (R. 13); that respondent's Night General Yardmaster had received advance information (by telegraph) from respondent's dispatcher at McComb, Mississippi, of the approximate time of the arrival of this car and when the period of rest(**) for the cattle was up; that

(*) If material, we here call attention to the fact that the designation "Stuyvesant Dock (Stock) Yards" appearing on page 3 of petitioner's brief is incorrect, the word "Stock" having been erroneously supplied by petitioner. Stuyvesant Dock Yard is on the Mississippi River in New Orleans, adjacent to the wharves, and is not a stock yard.

(**) Should be "when the legal period of confinement for the cattle was up."

because of the necessity of prompt handling of the cattle and the improbability of handling the car on regular trains (so as to reach destination prior to the expiration of the legal confinement period) he had procured an extra engine and crew and had them waiting for the arrival of the car, which was immediately switched and placed for delivery at the Crescent City Stock Yards at 2:50 A. M. on October 10, 1932, at which time the 36 hours permissible for the confinement of the cattle had not elapsed (R. 14); that respondent's Night General Yardmaster, whose duty it was to do so, failed to notify the Railroad Company's employe whose duty it was to unload the cattle that the car would be placed in the night time, which resulted in the car not being unloaded until 4:00 A. M. October 10, 1932 (R. 14), and that respondent's night General Yardmaster was dead (R. 14).

Though no evidence was in fact introduced on the trial of the case, the right to introduce evidence not inconsistent with the evidentiary facts stipulated was specifically reserved (R. 14), and it was further specifically stated in the stipulation that it was not agreed whether or not "said cattle were knowingly and wilfully confined for more than 36 hours" (R. 15), but that the legal rights were to be determined by the facts set forth in the stipulation and the evidence introduced on the trial of the cause.

The case was submitted to the District Court on the stipulation (R. 22). The United States moved for a judgment in its favor (R. 15) and findings of fact and conclusions of law (R. 18), and the respondent, Illinois Central Railroad Company, moved for a judgment in its favor (R. 16), and, in the alternative, for special charges

(R. 16). Included in the alternative request was one for general findings in respondent's favor and special findings of fact and law (R. 17).

The District Court denied petitioner's motion for a judgment and request for findings of fact and conclusions of law and reserved to petitioner a bill of exception to each of the rulings (R. 25), and rendered a judgment in favor of respondent, Illinois Central Railroad Company, dismissing the suit of the United States (R. 27). Findings of fact and conclusions of law were made substantially as had been requested by the respondent, Illinois Central Railroad Company (R. 22), and to these findings of fact and conclusions of law the United States also excepted (R. 26).

In his "Findings of Fact" the District Judge not only found all of the evidentiary facts agreed on in the stipulation which was entered into by the parties, but also found certain ultimate facts which, so far as they are here pertinent, are:

> "That the Illinois Central Railroad Company, defendant attempted in good faith to comply with the statutory requirement to unload the cattle within the statutory period." (R. 22).
>
> "That the failure of the Illinois Central Railroad Company to unload the cattle during the statutory period was not knowing and wilful." (R. 22).
>
> "That the failure of the Illinois Central Railroad Company to unload the cattle during the statutory period was due to the negligent oversight of the night yardmaster employed by the said defendant in failing to notify an employee of the Illinois Central Railroad Company to unload the said car of cattle

within the statutory period after the said night yardmaster had caused the said cattle to be transported to destination by a special train in a bona fide attempt to observe the said statutory requirement to unload the cattle within thirty-six hours, all as set forth specifically in paragraphs six and seven of the stipulated facts, which are attached hereto and made a part hereof." (R. 22-23).

In his "Conclusions of Law" the District Judge held that in an action for a penalty under Section 3 of the Cruelty to Animals Act *(45 U. S. C. 73)*, in order to determine whether cattle have been "knowingly and wilfully" confined, resort should not be had to the language of Section 1 of the act *(45 U. S. C. 71)*, and to that extent these two sections of the Cruelty to Animals Act should not be read in *pari materia* (R. 23). The Court also held that the negligence of a carrier's employee "while performing his regular duties is not equivalent to knowledge and wilfullness as these words are used in Section 73, Title 45 U. S. C. A.", (R. 23-24); that the failure to comply with the statutory requirement for unloading, watering and feeding the animals "must be occasioned by the knowing and wilfull act of a carrier" in order to render a carrier liable for the penalty, "and negligent failure to comply with the statute would not render the carrier liable for the penalty" (R. 24); and, finally, the Court held "that although there was actual negligence as set forth in the conclusions of fact and the stipulation, there was no wilfullness and knowledge within the meaning of Section 73, Title 45 U. S. C. A.", (R. 24).

The Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court (R. 52-56).

Summary of Argument.

I.

A jury having been waived and the case submitted to the District Judge on a stipulation of certain evidentiary facts which omitted the ultimate fact essential to the imposition of the penalty: whether or not the cattle had been confined "knowingly and wilfully", and the District Judge having found in favor of respondent Railroad Company, this finding of fact is entitled to the same weight as a verdict of a jury and is conclusive and not reviewable here.

II.

By the express terms of the Cruelty to Animals Act the carrier is liable for the statutory penalty prescribed by Section 3 thereof only where it has "knowingly and wilfully" confined animals more than 36 hours.

(A) It is a cardinal rule of statutory construction that no words appearing in a statute shall be treated as surplusage and that effect shall be given to every clause and part.

(B) The word "wilfully" as used in the Cruelty to Animals Act denotes an act which is more than negligent; it means purposely or obstinately and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.

(C) The words "knowingly and wilfully" as used in the Cruelty to Animals Act are to be taken according to their common meaning, and when so taken this Act is not made ambiguous by reason of their inclusion in Section

3 thereof; accordingly, the meaning of the Act must be sought in the Act itself and there can be no resort to an extrinsic source to determine its meaning or intent.

(D) Neither the legislative history, nor the Congressional debates cast any light on the reason for the inclusion of the word "wilfully" in Section 3 of the Cruelty to Animals Act.

III.

The preponderant authority is to the effect that a carrier is not liable for the penalty prescribed by Section 3 of the Cruelty to Animals Act, where the statutory period of confinement is exceeded by reason of an act occurring through the negligence or oversight of the carrier's employee.

ARGUMENT.

I.

The findings of fact of the District Judge are entitled to the same weight as the verdict of a jury and are conclusive and not reviewable here.

The question of whether or not the Cruelty to Animals Act has been violated "knowingly and wilfully" is a question of fact to be determined by the jury, or where a jury has been waived, by the District Judge. In either event, the finding of this ultimate fact binds the appellate courts and is not reviewable by them.

In *Philadelphia & R. Ry. Co. v. United States, (3rd C. C. A.), 247 Fed. 466,* which was an action to recover a penalty for a violation of the Cruelty to Animals Act, a

jury was waived and the case submitted on a stipulation of fact to the District Judge, who found that the railroad's violation of the statute was knowing and wilfull. Discussing this finding, the Circuit Court of Appeals said:

> "All the facts were undisputed, and the only point involved in the case now being considered is whether the District Court had competent evidence before it to support its finding that the railway's violation of the statute was knowing and willful.
>
> "*Such a finding is one of fact, and, like the verdict of a jury, binds a court of appeal, if it be supported by competent evidence.*" (Italics ours).

Chicago & N. W. Ry. Co. v. United States, (7th C. C. A.), 234 Fed. 272, (two cases) likewise involved the imposition of penalties for the violation of the Cruelty to Animals Act. Evidentiary facts were stipulated, but the ultimate fact of the wilfullness of the confinement was omitted from the stipulation. Both sides moved for a directed verdict; the District Court denied defendant's motion but granted the Government's, and directed a verdict for the United States. The Court of Appeals held that the question was one of fact for the jury, and that a judgment should not have been directed, saying:

> "*The ultimate question of the willfulness of the act of confinement must be determined from the evidentiary facts,* and it makes no difference that such facts appear by stipulation of the parties rather than through oral or documentary evidence.
>
> "Unless it can be said that reasonable minds would not differ in the conclusion to be drawn from the conceded facts, *the conclusion must be reached, not by the court as a matter of law, but by the trier of facts, the jury.*" (Italics ours).

The jurisprudence is generally to the effect that the question of wantonness or wilfullness is a question of fact to be submitted to and found by the jury.

In *Lacey v. Louisville & N. R. Co., (5th C. C. A.), 152 Fed. 134*, a suit for the wrongful death of plaintiff's intestate resulting from a railroad company's act in kicking freight cars across a public crossing likely to be used by pedestrians or vehicles at any time, without any one to control their movements or give warning of their approach, the Court held that the question of whether or not the act was wilfull or wanton was one for the jury.

In *Jeanery v. Chicago & I. Traction Co., 306 Ill. 392, 138 N. E. 203*, the Court held that whether the injuries to a railroad switching crew foreman by an interurban car at a grade crossing were wilfully and wantonly inflicted was a question for the jury.

Is *St. Clair v. Duluth Street Ry., 155 Minn. 203, 193 N. W. 690*, the Court held that whether the motorman of a street car was wilfully negligent in failing to exercise ordinary care after seeing the automobile in a place of danger and colliding with the automobile, was a question to be determined by the jury.

The jurisprudence of the State courts in automobile, street car and railroad crossings cases is preponderantly to the effect that the question of whether an injury has been inflicted through wanton and wilfull negligence is one for the jury.

We deem unnecessary further citation of authority on the point that the question of whether an act was knowingly and wilfully committed is one of fact to be determined by the jury.

The stipulation (R. 11) waiving the jury and agreeing on certain evidentiary facts specifically excludes any agreement as to the ultimate fact necessary to the determination of this case, that is whether the carrier "knowingly and wilfully" confined the cattle for a period longer than that permitted by the Cruelty to Animals Act. From the stipulated evidentiary facts, the District Judge was free to have concluded that the carrier had acted "knowingly and wilfully" in confining the cattle; however, the District Judge found this ultimate fact in favor of the respondent Railroad Company and specifically found that the Railroad Company *"attempted in good faith to comply with the statutory requirement to unload the cattle in the statutory period"* (R. 22); that the failure of the respondent Railroad Company *"to unload the cattle during the statutory period was not knowing and wilfull"* (R. 22); and that the failure of the respondent Railroad Company to unload the cattle during the statutory period was due to the negligent oversight of its night general yardmaster in failing to notify an employee of the Railroad Company to unload the cattle after this night yardmaster had caused the cattle to be transported to destination by a special engine "in a bona fide attempt to observe the said statutory requirement to unload the cattle within thirty-six hours" (R. 22-23). These findings of fact of the District Judge are entitled to the same effect as a verdict of a jury *(R. S. 649, 28 U. S. C. 773)*, and were not reviewable by the

Fifth Circuit Court of Appeals, and are not reviewable here, notwithstanding the fact that as an original proposition the Fifth Circuit Court of Appeals might have reached a different result on the stipulated evidentiary facts or that this Court might possibly do so.

In *United States v. Jefferson Electric Mfg. Co., 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859,* while considering a similar situation, this Court said *(291 U. S. 407):*

> "Whether the District Court erred in denying the defendant's motion at the conclusion of the evidence for judgments thereon in his favor must be determined by ascertaining whether there was substantial evidence fairly tending to establish every element of the plaintiff's causes of action. We think there was such evidence. There was conflict in it; parts of it admitted of diverging inferences; and as to some matters the preponderating weight was difficult of ascertainment. But these were all matters for the trial court to determine. It was exercising the functions of a jury and its findings are on the same plane as if embodied in a jury's special verdict. We are accordingly of opinion that the motion was rightly overruled, and that the Circuit Court of Appeals erred in not so holding. Even if there was some basis for thinking the weight of the evidence was with the defendant, as was strongly urged at our bar, it was not within the province of that court to reexamine the evidence and reverse the judgments because of what it regarded as error of fact."

A similar situation was presented to the First Circuit Court of Appeals in the case of *United States v. Boston & M. R. R., 84 F. (2d) 365,* a suit by the United States against the Boston & M. R. R. for a penalty for confin-

ing sheep in cars longer than permitted by the Cruelty to Animals Act. There too the case was submitted to the District Judge on an agreed statement of fact which omitted an admission of the ultimate fact necessary to liability under the terms of the statute, that is whether or not the confinement of the sheep in the cars more than thirty-six hours was the result of an act knowingly and wilfully done by the carrier. The District Judge found that the facts stipulated "did not establish a wilfull disregard of the statute" and ordered that judgment be rendered for the defendant. Affirming the District Court's judgment, the Court of Appeals said:

> "Although, according to the agreed facts, the defendant knew, or ought to have known, that its conduct might result in violations of the statute, the agreed facts did not include a finding of the ultimate fact essential to the imposition of a penalty, viz., that the acts complained of were willful violations of the statute. Whether the defendant's conduct was willful or not was for the trial court to determine as an inference of fact from the agreed facts; they being all the evidence in the case from which the conclusion could be drawn.
>
> "* * * * * *
>
> "When the agreed facts contain all the facts *essential* to a judgment for one party or the other, then an appeal from such a judgment raises the question whether the facts agreed upon were sufficient to support the judgment; and this is so irrespective of whether an exception was taken to the judgment or not, for, in such case, the error, if one exists, appears upon the record proper and no exception is necessary. Sanfeliz v. Bank (C. C. A.) 74 F. (2d)

> 338, 340. But in this case the facts agreed upon do not contain all the facts essential to a judgment, and a finding of an ultimate fact one way or the other was required for its justification. This being so, an exception to the judgment on the ground that the agreed facts presented only a question of law could avail nothing, as the agreed facts alone do not require a verdict either way. United States v. Smith, supra."

We submit that, according to the unanimous jurisprudence, the finding of the District Judge that the cattle were not "knowingly and wilfully" confined by the respondent carrier beyond the statutory period is a finding of fact which is entitled to the same weight and dignity as the verdict of a jury; that this finding was not reviewable by the Fifth Circuit Court of Appeals, and is not reviewable by this Court; that all other questions which the Government has sought to raise are immaterial to the proper disposition of this case, and, accordingly, the decision of the Court below should be affirmed on the ground that there is no question of law before this Court for determination.

While we are firmly convinced that this is the proper disposition to be made of this case, nevertheless, if your Honors disagree, we submit that the legal interpretation which has been put upon the Cruelty to Animals Act by the District Court and the Fifth Circuit Court of Appeals is correct, and that the decisions of the Court below should be affirmed.

II.

By the express terms of the Cruelty to Animals Act the carrier is liable for the statutory penalty prescribed by Section 3 thereof only where it has "knowingly and wilfully" confined animals more than 36 hours.

By its express terms, the Cruelty to Animals Act imposes a penalty for its violation only upon a carrier who "knowingly and wilfully" violates its terms.

We do not contend that Congress could not impose upon a carrier the absolute duty to unload cattle within a reasonable period and penalize the carrier's negligent failure to do so; we do contend that Congress has not done so, but has restricted the imposition of a penalty to those cases where the carrier has "knowingly and wilfully" violated the Cruelty to Animals Act.

Section 1 of the Act requires carriers to unload cattle and place them in properly equipped pens for rest, water and feed for a period of at least five consecutive hours after confinement of not more than 28 hours, or, with the written consent of the shipper, 36 hours, "unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight". However, there is no penalty provided for the violation of this statutory requirement. The sole imposition of a penalty is found in Section 3 of the Act wherein a carrier "who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall for every such penalty be liable for the forfeit and pay a penalty of not less than $100

nor more than $500". Accordingly, by its express terms, the act makes the knowledge and wilfullness of the offending carrier an essential condition precedent to the imposition of the penalty.

It is to be noted that the penalty provision of the Cruelty to Animals Act differs from the penalty provisions of other railroad regulatory acts, in that in the Cruelty to Animals Act the imposition of the penalty is restricted to those cases where the violation of the statute has occurred "knowingly and wilfully". In the others acts the penalty is imposed for the violation of the act regardless of the carrier's knowledge and wilfullness.

The Hours of Service Act was adopted by Congress on March 4, 1907, *(34 Stat. 1415, 45 U.S.C. 61, et seq)*, just a year after Congress had reenacted the Cruelty to Animals Act. That act prohibited interstate rail carriers from permitting specified employees to work for a period exceeding 16 consecutive hours. The statute provides:

> "It shall be unlawful for any common carrier, its officers or agents, subject to this chapter to require or permit any employee subject to this chapter to be or remain on duty for a longer period than sixteen consecutive hours * * *." *(45 U. S. C. 62)*.

The penalty provision is that

> "Any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the next preceding section of this chapter, shall be liable to a penalty of not less than $100.00 nor more than $500.00 for each and every violation, to be recovered in a suit or suits to be brought by the

> United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violations shall have been committed; * * *." *(45 U. S. C. 63).*

Minneapolis St. P. & S. S. M. Ry. Co. v. United States, (8th. C. C. A.), 240 Fed. 315 was a case under this act in which the United States sought to recover the penalty. The carrier defended on the ground that though certain of its employees had actually been on duty more than 16 consecutive hours, their continued employment was due to the carelessness of the employees. The Court discussed the purpose of the bill and quoted from the Congressional Committee Reports from which it appeared that when the bill was reported back from the House Committee on Interstate and Foreign Commerce, that Committee had inserted a provision requiring knowledge on the part of the carrier as a condition precedent to the imposition of the penalty. This condition was stricken from the bill by the Rules Committee, and the acts as finally adopted by Congress omitted the use of the word "knowingly". The Court held that the carrier was liable for the penalty regardless of its knowledge that the act was being violated.

This act was before a United States District Court in *United States v. Baker, 261 Fed. 703*, and what Judge Hutcheson, then District Judge, had to say in disposing of the case is most apposite:

> "In a case of this kind, where the words 'knowingly and wilfully' are not employed, and the carrier is made liable if it requires or permits any employee to be or remain on duty in violation of statutory provisions, the fact of doing the thing pro-

hibited by statute constitutes the offense, although there is no turpitude or wrong arising out of wilfullness or special intent."

The Safety Appliance Acts, (Act of March 2, 1893, *27 Stat. 531;* Act of April 14, 1910, *36 Stat. 296, 45 U. S. C. 1, et seq.)*, likewise impose penalties on a carrier who violates their provisions, without mention of the knowledge and wilfullness of the carrier, and the statute has been interpreted many times by the lower federal courts and by this Court in *Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 233, 36 S. Ct. 482, 60 L. Ed. 874* as penalizing the carrier for any violation of the absolute duty put upon it by the Acts.

Again in the Ash Pan Act, (Act of Congress of May 30, 1908, *35 Stat. 476, 45 U. S. C. 17, et seq.*), we find a penalty imposed on a carrier who violates its provisions, regardless of whether or not the violation was knowing and wilfull *(45 U. S. C. 18)*. The Boiler Inspection Act, (Act of February 17, 1911, *36 Stat. 913*, as amended, *45 U. S. C. 22, et seq.)*, likewise imposes a penalty on a carrier who violates its provisions, regardless of whether the violation is knowing and wilfull *(45 U. S. C. 34)*.

It therefore appears that Congress has enacted a body of regulatory law and that in only one of the statutes, the Cruelty to Animals Act, has it conditioned the imposition of a penalty upon the knowledge and wilfullness of the carrier violating the act. It further appears that while debating the Hours of Service Act Congress considered the advisability of conditioning the imposition of the penalty for its violation on the knowledge of the offending

carrier and decided not to do so. It therefore follows that Congress consciously and deliberately has differentiated between statutes designed to protect human beings and the one statute designed to protect animals, and in the case of the former has imposed an absolute duty on carriers and penalized any breach thereof regardless of the carrier's knowledge and wilfullness, while in the latter it has only penalized the breach where it has resulted in the knowledge and wilfullness of the carrier.

(A) **It is a cardinal rule of statutory construction that no words appearing in a statute shall be treated as surplusage and that effect shall be given to every clause and part.**

In construing the penalty provision of the Cruelty to Animals Act, full effect must be given to the words "knowingly and wilfully", and they cannot be disregarded.

In *Platt v. Union Pacific R. R. Co., 99 U. S. 48, 58, 25 L. Ed. 424*, this Court said:

> "But the admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute. In Commonwealth v. Alger (7 Cush. (Mass.) 53-89), it was said that in putting a construction upon any statute every part must be regarded, and it must be so expounded, if practicable, as to give some effect to every part of it. So, in People v. Burns (5 Mich. 114), it was held that some meaning, if possible, must be given to every word in a statute, and that where a given construction would make a word redundant, it was reason for rejecting it. To the same effect is Dearborn and Others v. Inhabitants

of Brookline (97 Mass. 466); and in Gates v. Salmon (35 Cal. 576) it was ruled that no words are to be treated as surplusage or as repetition."

In *Montclair v. Ramsdell, 107 U. S. 147, 152, 2 S. Ct. 391, 27 L. Ed. 431*, this Court said:

"It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."

In *Ginsberg & Sons v. Popkin, 285 U. S. 204, 208, 52 S. Ct. 322, 76 L. Ed. 704*, this Court said:

"General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. United States v. Chase, 135 U. S. 255, 260. Specific terms prevail over the general in the same or another statute which otherwise might be controlling. Kepner v. United States, 195 U. S. 100, 125. In re Hassenbusch, 108 Fed. 38. United States v. Peters, 166 Fed. 613, 615. The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute. Market Co. v. Hoffman, 101 U. S. 112, 115. Ex parte Public National Bank, 278 U. S. 101, 104."

In *Rice v. The Minnesota & North Western Railroad Co., 1 Black 360, 379, 17 L. Ed. 147*, this Court said:

"Whether the provision be just or unjust, the words mentioned are a part of the act, and it is not competent for this court to reject or disregard a material part of an act of congress, unless it be so clearly repugnant to the residue of the act that the whole cannot stand together."

(B) The word "wilfully" as used in the Cruelty to Animals Act denotes an act which is more than negligent: it means purposely or obstinately and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.

The words "knowingly" and "wilfully" have a well understood common meaning. They have been used countless times in state and federal statutes, both penal and civil.

The Government is undertaking to distinguish between the meaning of the word "wilfully" as used in a criminal statute and as used in a civil statute, and is contending that as this is a civil suit to collect a penalty, a construction should be given to the word "wilfully" different from that usually accorded it in construing criminal statutes.

We submit that "while this proceeding is civil in its form, it is criminal in its nature and effect", (Judge Sanborn in *Missouri K. & T. Ry. Co. v. United States, 178 Fed. 15, 18)*, and no distinction should be drawn in the use of the word "wilfully" based on a theoretical difference between a civil and criminal statute.

In any event, we submit that as a practical matter there is no such distinction as is evidenced by the jurisprudence of this Court in which the word "wilfully" has been defined.

Felton v. United States, 96 U. S. 699, 24 L. Ed. 875, was a civil proceeding to collect a penalty from distillers

"upon the alleged ground that they 'knowingly and wilfully' omitted, neglected, and refused to construct and maintain pipes and other apparatus connecting the receiving cisterns in their distilleries with other apparatus in the manner required by the statute of the United States." The defense was lack of knowledge and wilfullness, and in sustaining this defense, this Court said:

> "So far from showing or tending to show that, when the new still was made and placed in the distillery, the defendants, or any of their servants, had any knowledge of the incapacity of the receiver to hold all the wines that might be distilled on any day, it showed their ignorance of the defect until it was too late to remedy it for the distillation then taking place. There was, therefore, the absence of that knowledge which could render the neglect wilful, and therefore actionable. They must have 'knowingly and wilfully' omitted to furnish a receiver of sufficient capacity, before the severe penalty prescribed could be imposed upon them and their distilled spirits subjected to forfeiture. *Doing or omitting to do a thing knowlingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. 'The word "wilfully," ' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose.' 20 Pick. (Mass.) 220. 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. i, sect. 428.*" (Italics ours).

Let us compare the definition of "wilfull" found in this civil proceeding with the definition pronounced by this Court in criminal proceedings.

In *Potter v. United States, 155 U. S. 438, 15 S. Ct. 144, 39 L. Ed. 214*, and again in *Spurr v. United States*,

174 U. S. 728, 19 S. Ct. 812, 43 L. Ed. 1150, criminal prosecutions for "wilfully" violating the provisions of an act relative to certifying checks by national banks, this Court in defining "wilfully" said:

> "* * * The significance of the word 'wilful' in criminal statutes has been considered by this court. In Felton v. United States, (96 U. S. 699, 702,) it was said:
>
> > 'Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. "The word 'wilfully' " says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose.' 20 Pick. (Mass.) 220. 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. 1, sect. 428."

In *United States v. Murdock, 290 U. S. 389, 78 L. Ed. 381, 54 S. Ct. 223,* cited and relied on by the Government in its brief, which was a prosecution under the Revenue Acts of 1926 and 1928 for "wilfully" failing to supply information where it appeared that the defendant had refused to answer questions on the ground he might be subjected to prosecution under state laws, the Court in defining "wilfully" again referred to the case of *Felton v. United States, supra,* which, as heretofore pointed out, was a civil suit for a penalty.

Accordingly, we submit that the jurisprudence of this Court demonstrates that the theoretical distinction which the Government is seeking to have this Court draw does not in fact exist, and there is no difference in the meaning of the word "wilfully" when contained in a crim-

inal statute from its signification in a civil statute imposing a penalty for its violation.

The lower federal courts in construing the word "wilfully" in civil cases have also accepted it in the same significance as used in criminal cases.

"Wilfull" as applied to an injury inflicted by a bankrupt defeating the right to a discharge in bankruptcy has been defined as free activity inspired by conscious motion of will. *In re Vena (D. C. Washington), 46 F. (2d) 81.*

In construing the meaning of "wilfull misconduct" of an injured seaman as barring him from his right to wages, maintenance and cure, the Court again defined "wilfull" as "free activity inspired by conscious motion of the will." *Meyer v. Dollar S. S. Line, (D. C. Washington), 43 F. (2d) 425.*

The same is true of the countless decisions of the State Courts wherein they have been called upon to construe the word "wilfull" in civil statutes. For instance:

In construing a Florida election statute providing that any candidate refusing or "wilfully" failing to obey the provisions of another section of the statute should not be allowed to have his name printed on the official ballot, the Court held that the word "wilfully" denotes some element of design, intention, or deliberation and conscious purpose to disobey, and not merely innocent neglect or mere omission to perform a previously imposed duty. *County Canvassing Board v. Lester, 96 Fla. 484, 118 So. 201.*

In a statute providing a right of action for injury occasioned by wilfull violation thereof the word "wilfull" has been defined as a conscious act rather than mere inadvertence. *New Union Coal Co. v. Walker, 182 Ark. 460, 31 S. W. (2d) 753, 755.*

In amplification of the principle announced in the last cited case that "wilfulness" means a conscious act rather than mere inadvertence, we further point out that "wilfulness" means something entirely different from "negligence".

In *Kelly v. Mellott, (7th C. C. A.), 135 Fed. 74, 76,* the Court said:

> "Negligence and wilfullness are as unmixable as oil and water. 'Wilful negligence' is as self-contradictory as 'guilty innocence' ".

In *Payne v. Vance, 103 Ohio State 59, 133 N. E. 85,* (quoting *Louisville, N. A. & C. R. Co. v. Bryan, 107 Ind. 51, 7 N. E. 807),* the Court said:

> "The words 'willful' and 'negligent', used in conjunction, have not always been employed with strict regard for accuracy of expression. To say that an injury resulted from the negligent and willful conduct of another is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath than an act was done through inattention, thoughtlessly, heedlessly, and at the same time purposely and by design."

The construction for which we are contending for the words "knowingly and wilfully" has been accorded

them many times by the lower federal courts in suits for penalties under the Cruelty to Animals Act.

The words "knowingly and wilfully" as used in the Cruelty to Animals Act have been construed in many cases by the Federal Courts, among which are the following:

In *St. Louis & S. F. R. Co. v. U. S., (Eighth C. C. A.) 169 Fed. 69*, the court said at *page 71:*

> " 'Knowingly' evidently means with a knowledge of the facts which taken together constitute the failure to comply with the statute, as in the case where one carrier receives from another a car loaded with cattle, and, with knowledge of how long they then had been confined in the car without rest, water, or food, prolongs the confinement until the statutory limit is exceeded. 'Wilfully' means something not expressed by 'knowingly', else both would not be used conjunctively. And presumptively it means something not expressed by 'willingly', else the change from that word would not have been made when the old statute (Rev. St. Sects. 4386-4390 (U. S. Comp. St. 1901, pp. 2995-2997) was being re-enacted. Crawford v. Burke, 195 U. S. 176, 190, 25 Sup. Ct. 9, 49 L. Ed. 147; Hopper v. Denver, etc. Co., 84 C. C. A. 21, 24, 155 Fed. 273, 276. But it does not mean with intent to injure the cattle or to inflict loss upon their owner because such intent on the part of a carrier is hardly within the pale of actual experience or reasonable supposition. United States vs. Union Pacific RR. Co., supra. So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."

In *St. Joseph Stockyards Co. v. United States, (Eighth C. C. A.) 187 Fed. 104*, the court said, in part, at *page 105:*

> "The words 'knowingly and willfully' in this statute have significance, and in the enforcement of it they must have effect. '"Knowingly" evidently means with a knowledge of the facts which, taken together, constitute the failure to comply with the statute, as is the case where one carrier receives from another a car loaded with cattle, and, with knowledge of how long they then had been confined in the car without rest, water, or food, prolongs the confinement until the statutory limit is exceeded. * * * "Wilfully" means purposely or obstinately, and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.' St. Louis & S. F. R. Co. v. United States, 94 C. C. A. 437, 439, 169 Fed. 69, 71; United States v. Sioux City Stockyards Co., (C. C.) 162 Fed. 556, 560, 562; United States v. Stockyards Terminal Co. (C. C.) 172 Fed. 452; New York Central & H. R. R. Co. v. United States, 165 Fed. 833, 841, 91 C. C. A. 519, 527."

In *Oregon-Washington R. & Nav. Co. v. United States (Ninth C. C. A.) 205 Fed. 337*, the court said, in part, at *page 339:*

> "The words 'knowingly and willfully', as employed in the act, have been many times construed and their meaning determined. 'Knowingly' signifies 'with a knowledge of the facts which, taken together, constitute the failure to comply with the statute'; and 'willfully' means 'purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either in-

tentionally disregards the statute or is plainly indifferent to its requirements.' Such is the interpretation given by Mr. Justice Van Devanter while a member of the Circuit Court of Appeals of the Eighth Circuit. St. Louis & S. F. R. Co. v. United States, 169 Fed. 69, 71, 94 C. C. A. 437, 439. The same court in another case, in an opinion rendered by Adams, Circuit Judge (United States v. Union Pac. R. Co., 169 Fed. 65, 67, 94 C. C. A. 433, 435), defines the word 'wilfully,' not as implying a vicious or evil intent, but the 'intentional doing of an act forbidden by the statute.' This view of the significance of the word is followed in a still later case from the same circuit. Chicago, B. & Q. R. Co. v. United States, 194 Fed. 342, 114 C. C. A. 334. See, also, New York Cent. & H. R. R. Co. v. United States, 165 Fed. 833, 91 C. C. A. 519."

In *St. Louis Merchants' Bridge Terminal Railway Co. v. United States (Seventh C. C. A.), 209 Fed. 600*, the Court, at *page 601*, adopted the construction placed upon the statute by the Eighth Circuit Court of Appeals, saying *(page 601)*:

"The declaration charges, as the statute requires, that plaintiff in error 'knowingly and willfully confined' said stock in said cars for a longer period than that permitted by the statute. As was said by the United States Circuit Court of Appeals for the Eighth Circuit in C., B. & Q. Ry. Co. v. United States, 194 Fed. 342, 114 C. C. A. 334:

" 'Willfully' means purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."

In *United States v. Lehigh Valley R. Co. (Third C. C. A.), 204 Fed. 705*, the court said *(page 708)*:

> "* * * The verdict requires us to assume that the lambs were not fed within the statutory period; but we repeat that in our opinion the fact is accounted for by negligence, and cannot be attributed to a 'knowing and willful' disregard of duty.
>
> "These words mean something more than 'negligent'. A knowing and willful omission to perform a duty is not, as we think, the same as a merely careless omission. For example: Let us suppose that the man whose duty it was to feed these lambs had learned the length of their confinement from the card accompanying the shipment, but that his attention had been diverted, so that he forgot his task until the period limited by the statute had passed. No doubt this would be negligence, but to call it a 'willful' failure of duty seems to contradict one of the essential facts supposed. It is not possible to omit an act knowingly and willfully, unless the act be consciously in the mind; if it be no longer in the mind, it cannot be within the range of either knowledge or intention."

It would serve no useful purpose to cite further definitions by the lower Federal courts, but we refer your Honors to the following cases in which the words "knowingly and willfully" were construed and in which the courts have held that a carrier is only to be penalized in those cases where there has been a willful and deliberate disregard of the statute, that is to say where the carrier has deliberately or obstinately refused to comply with the provisions of the statute or has manifested such reckless in-

difference as to whether or not the statute is compiled with, that the act amounts to a deliberate disregard of the statute. See:

United States v. Kansas City Southern Ry. Co. (8th C. C. A.) 202 Fed. 828, 833;
Chicago B. & Q. R. Co. v. United States (8th C. C. A.) 194 Fed. 342, 346;
United States v. Chicago R. I. & P. Ry. Co. (D. C. N. D. Ill.) 211 Fed. 770;
United States v. Philadelphia & R. Ry. Co. (D. C. E. D. Penn.) 223 Fed. 213;
United States v. Southern Rwy. Co. (D. C. E. D. Tenn.) 1 F. (2d) 607.

We submit that the word "wilfully" as used in the Cruelty to Animals Act is to be taken in its ordinary acceptation and means purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements; that "wilfully" means something entirely different from "negligently" and that the former means purposely and by design, while the latter means unintentionally, thoughtlessly and heedlessly; that before an act can be wilfully performed there must be a conscious motion of will and free activity as distinguished from inactivity and unconsciousness, which are both earmarks of negligence; and finally, that "wilfully" presupposes either deliberate action, intent, recklessness, or absolute sheerlessness as opposed to mere inattention and inadvertence which constitute negligence.

(C) The words "knowingly and wilfully" as used in the Cruelty to Animals Act are to be taken according to their common meaning, and when so taken this Act is not made ambiguous by reason of their inclusion in Section 3 thereof; accordingly the meaning of the Act must be sought in the Act itself and there can be no resort to an extrinsic source to determine its meaning or intent.

A cardinal rule of statutory construction is that in seeking the meaning of a statute, resort must first be had to the language of the statute itself.

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, * * * ." *Caminetti v. United States, 242 U. S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442.*
>
> "Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed." *United States v. Standard Brewery, 251 U. S. 210, 217, 40 S. Ct. 139, 64 L. Ed. 229.*

In *United States v. Shreveport Grain & Elevator Company, 287 U. S. 77, 83, 53 S. Ct. 42, 77 L. Ed. 175,* this court pointed out that the English rule is the same and cited with approval *King v. Commissioners, 5 A. & E. 804, 816,* in which that Court said that it

> "* * * was constrained to give the words of a private act then under consideration an effect which probably was 'never contemplated by those who obtained the act, and very probably not intended by the legislature which enacted it. But our duty is to look to the language employed, and construe it in its natural and obvious sense'."

Another cardinal principle of statutory construction is that in examining the language of a statute the words used are to be taken in their common meaning.

> "Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them. *Caminetti v. United States, supra, at p. 485.*

> "Of course, effect must be given to the intention of the legislature as manifested by the words of the statute, interpreted according to their natural signification." *McBroom v. Scottish Mortgage and Land Investment Co., 153 U. S. 318, 323, 14 S. Ct. 852, 38 L. Ed. 729.*

Taking the words "knowingly" and "wilfully" as found in Section 3 of the Cruelty to Animals Act in their common meaning, we find an act which is logical and wholly unambiguous; we find an act which in Section 1 prescribes a standard of conduct for carriers of cattle, and which in Section 3 penalizes the carrier who "knowingly and wilfully" fails to comply with that standard. The fact that the statute does not undertake to penalize the carrier who does not comply with the standard of conduct prescribed by Section 1 of the Act, unless the violation of that standard occurs "knowingly and wilfully", does not make the statute ambiguous; on the contrary, it is quite unambiguous. The logical, and we submit the proper construction of the Cruelty to Animals Act is that Section 1 thereof prescribes a standard of conduct for a carrier, the violation of which gives rise to a civil cause of action by any shipper, consignee or other private party who may be injured thereby, and it is no defense to such an action that the carrier's employees were negligent. On the other hand,

Section 3 of the act penalizes the carrier who "knowingly and wilfully" violates the act, and it is no defense to a suit for such a penalty that neither the shipper nor consignee have been damaged, nor the cattle injured, but there is reserved to the carrier the defense that the violation of the statute, by reason of which the penalty is sought to be inflicted, was not "knowingly and wilfully" committed.

The construction for which we are contending was adopted by Justice Van Devanter when he sat as Circuit Judge in the Eighth Circuit, in *St. Louis & S. F. R. Co. v. U. S., 169 Fed. 69*, in which he said:

> "At the conclusion of all the evidence the defendant requested that a verdict be directed in its favor, and error is assigned upon the denial of that request. It will be assumed, but without so deciding, that the statute is directed not merely against the continuous confinement of cattle in cars beyond the prescribed period of 28 or 36 hours, as the case may be, without rest, water, or food, but also against unloading them for rest, water, and feeding into pens not properly equipped therefor, that the pen into which these cattle were unloaded was not properly equipped in the sense of the statute, and that ordinarily to unload cattle into such a pen for rest, water, and feeding is to fail to comply with the statute; and, with these matters so disposed of, we will consider only whether there was any substantial evidence from which the jury reasonably could have found that the defendant knowingly and willfully failed to comply with the statute in this instance. We say 'knowingly and willfully' because, as was recently said by Judge Adams in speaking for this Court, '*it appears that section 1 creates a duty to be performed by carriers, and that section 3 imposed a penalty not for the failure to perform the duty, but only when the carrier "knowingly and*

willfully" fails in that regard.' United States v. Union Pacific R. R. Co. (C. C. A.) 169 Fed. 65. *The qualifying words cannot be disregarded. They mean something, and whatever that may be is an essential element of every right to the penalty."* (Italics ours).

In *United States v. Union Pacific R. Co. (8th C. C. A. 1909), 169 Fed. 65*, referred to by Mr. Justice Van Devanter, *supra*, the Court said:

"* * * Section 1 of the act of June 29, 1906 provides that no railroad engaged in interstate commerce in the transportation of cattle, sheep, swine, or other animals shall, without the written request of the owner or person in custody thereof, 'confine the same in cars * * * for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight'. The provisions of section 2 are immaterial for our present inquiry. Section 3 provides 'that any railroad' engaged in interstate commerce '* * * who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars.' Section 4 provides 'that the penalty created by the preceding section shall be recovered by civil action. * * *' From the foregoing it appears that section 1 creates a duty to be performed by carriers *and that section 3 imposes a penalty not for the failure to perform the duty, but only when the carrier 'knowingly and willfully' fails in that regard."* (Italics ours).

Referrring to its decision in the last cited case, the Eighth Circuit Court of Appeals in the case of *St. Joseph Stockyards Company v. United States (1911), 187 Fed. 104, 105*, said:

> "This court has often had occasion to consider the 28-hour law, and from its previous decisions these conclusions may be safely drawn. Section 1 of this statute imposes upon every railroad company carrying cattle from one state to another the duty to unload them for rest, water, and feeding once in 28 hours, in the absence of a request for an extension of this time to 36 hours; *and section 3 of the act imposes penalties for which these judgments were rendered, not for a failure to discharge the duty prescribed by section 1, but for 'knowingly and willfully' failing to discharge it.* United States v. Union Pacific R. Co., 94 C. C. A. 433, 434, 169 Fed. 65, 66." (Italics ours).

The construction for which we are contending was likewise adopted by Judge Hutcheson in his opinion in this case (R. 54, *90 F. (2d) 213, 215*):

> "We think appellee has the right of it. To take appellant's view we should have to disregard the settled meaning of the words 'knowing and wilful' when used in penalty and criminal statutes. To take that view we should have to assume that Congress in Section 3 idly used two words of known and settled legal meaning, intending that the section should be read as though they were not in it. To take that view we should have to close our eyes to the obvious distinction which Congress plainly intended and aptly made by the use of the words in question, between the duty to unload unless prevented by causes beyond its control, imposed upon the carrier by Section 1, and the liability for penalties imposed upon it by Section 3 for knowingly and wilfully failing to perform the imposed duty."

The Cruelty to Animals Act as so construed is plain and unambiguous. However the United States is unwilling to accept the construction of the Act wherein the words "knowingly and wilfully" are taken in a common meaning and according to their natural signification, because to do so it is claimed would result in the inability of the Government to inflict the penalty in those cases where the carrier's conduct in confining the cattle beyond the statutory period was due to the ordinary negligence of its employees. What the Government is seeking is a construction of the Cruelty to Animals Act whereby a penalty will be imposed on every carrier who confines cattle in cars beyond the statutory period, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight.

The answer to the Government's contention is that Congress has not enacted a statute which imposes a penalty upon the carrier who has not violated its terms "knowingly and wilfully", and that if it is necessary or desirable to impose an absolute duty on a carrier to unload cattle within a certain time and to penalize the breach of this duty, it is for Congress to so determine and not for the courts to bring about that result by substituting statutory construction for legislation. As was said by this court in *Merritt v. Welsh, 104 U. S. 694, 705, 26 L. Ed. 896*, a case in which the Government was seeking to subject certain goods to the Custom Laws under a forced construction thereof, which this Court refused to adopt:

> "A better remedy than that of making a forced construction of the law is in the power of Congress. All that has to be done is, to change the

law so as to reach the goods in their new form, if it is thought desirable to do so. If the law is found defective, let it be altered so as to attain the result desired."

In *United States v. Missouri Pacific R. R. Co., 278 U. S. 269, 49 S. Ct. 133, 73 L. Ed. 322,* where the United States was insisting on a forced construction of a statute to bring about a result desired by the Government, but not intended by Congress, this Court said *(page 277):*

> "The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation. United States v. Wiltberger, 5 Wheat, 76, 95-96. United States v. Fisher, 2 Cranch 358, 386. Lake County v. Rollins, 130 U. S. 662, 670. Caminetti v. United States, 242 U. S. 470. Ex parte Public National Bank, ante, p. 101. United States v. Colorado & N. W. R. Co., 157 Fed. 321, 327."

Nevertheless, the United States is attempting to have this Court make a forced construction of the Cruelty to Animals Act whereby the words "knowingly" and "wilfully" will not be taken in their common meaning, and in aid of such construction seeks to refer to legislative history

of the Cruelty to Animals Act and the congressional debates which took place upon the adoption of the original act (Cruelty to Animals Act of March 3, 1873).

Our reply is that there is no ambiguity in the Cruelty to Animals Act and nothing to construe, and, therefore that there is not only no reason to refer to legislative history and congressional debates which Congress held on the adoption of the Act of 1873, but also that it is improper to do so. As was said by this Court in *United States v. Shreveport Grain & Elevator Co., supra, at P. 83,* when it was sought to refer to the Report of the House Committee on Interstate and Foreign Commerce on a bill which afterward became the act in question in that case:

> "In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. Wisconsin R. R. Comm. v. C. B. & Q. R. Co., 257 U. S. 563, 588-589; Penna. R. Co. v. International Coal Co., 230 U. S. 184, 199; Van Camp & Sons v. American Can Co., 278 U. S. 245, 253. Like other extrinsic aids to construction their use is 'to solve, but not to create an ambiguity.' Hamilton v. Rathbone, 175 U. S. 414, 421. Or, as stated in United States v. Hartwell, 6 Wall. 385, 396, 'If the language be clear it is conclusive. There can be no construction where there is nothing to construe.'"

In *Fairport R. Co. v. Meredith, 292 U. S. 589, 594, 54 S. Ct. 826, 78 L. Ed. 1446,* this Court said:

> "But we are asked to hold that the title expresses the sole intent of the act, and this involves

a question of statutory construction. The title of an act and the history leading up to its adoption, as aids to statutory construction, are to be resorted to only for the purpose of resolving doubts as to the meaning of the words used in the act in case of ambiguity. Patterson v. Bark Eudora, 190 U. S. 169, 172; Cornell v. Coyne, 192 U. S. 418, 430; Lapina v. Williams, 232 U. S. 78, 92. Compare Russell Motor Car Co. v. United States, 261 U. S. 514, 519, 522. But here the words of sections 1 and 9 of the act speak plainly and nothing in the nature or operation of the legislation requires, or suggests the necessity of, an appeal to extrinsic aids to determine their meaning. It may be that the protective operation of section 2 of the act requiring automatic couplers was not meant to extend to persons other than employees."

The latest case involving reference to extraneous sources for the purpose of construing the meaning of a statute is *Wright v. Vinton Branch of the Mountain Trust Bank, 300 U. S. 440, 57 S. Ct. 556, 81 L. Ed. 487.* In that case the Court found that the language of the Frazier-Lemke Act was not free from doubt, so that the Court was "justified in seeking enlightenment from reports of congressional committees and explanations given on the floor of the Senate and House by those in charge of the measure (300 U. S. 463)". In support of that statement there appears a foot-note of which the pertinent portion reads:

"Where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation to reports of Congressional committees which have considered the measure, * * * and to the debates in general in order to show common agreement on purpose *as distinguished from interpretation of particular phraseology.* * * *." (Italics ours).

The Wright-Vinton Branch case is important as pointing out the exception for which we are contending here, that in the case of the interpretation of particular phraseology where as here, there is involved interpretation of the phrase "knowingly and wilfully", there can be no reference to the debates in Congress.

We repeat, the Cruelty to Animals Act is plain and unambiguous. Its enactment was unquestionably within the power of Congress, and "the sole function of the courts is to enforce it according to its terms". *Caminetti v. United States, supra, at P. 485.* It is the court's "duty" to do so *(United States v. Standard Brewery, supra, 217)*, and Courts "have no choice but to follow it without regard to the consequences". *(Commissioner of Immigration v. Gottlieb, 265 U. S. 310, 313, 44 S. Ct. 528, 68 L. Ed. 1031)*, and "whatever may have been in the minds of the individual members of Congress." *Merritt v. Welsh, supra, at P. 702).* In that situation "the duty of interpretation does not arise". *Caminetti v. United, supra, at P. 485.*

(D) **Neither the legislative history nor the Congressional debates cast any light on the inclusion of the word "wilfully" in Section 3 of the Cruelty to Animals Act.**

Even if the Cruelty to Animals Act were ambiguous, and it were necessary to resort to extrinsic sources to seek aid in its construction, there is nothing in the legislative history of the Cruelty to Animals Act nor in the Congressional debates attendant on the adoption of the present

Act of 1906 or its predecessors, Sections 4386-4390 of the Revised Statutes, previously the Cruelty to Animals Act of March 3, 1873, which sheds any light on the reason for the inclusion of the word "wilfull" in the Act.

As pointed out in the Government's brief, in the original Act of 1873 we find the word "wilfully", which became "willingly" in the Revised Statutes, and when the Cruelty to Animals Act was reenacted in 1906, the word "wilfully" was again used. Why the word was changed from "wilfully" in the Act of 1873 to "willingly" in the Revised Statutes is unknown, and, in our opinion, immaterial. There is nothing in the debates attendant on the adoption of the Act of 1906 which casts any light on the use of the word "wilfully", and the only source from which any information could possibly be drawn is in the debates in Congress on the adoption of the original Act of 1873.

These debates, which appear in the Congressional Globe, Vol. 104, Part 5, 42nd Congress, First Session, the pertinent parts of which are set out in the Government's brief at page 17, show that the Act originated in the House of Representatives and that as originally passed there, it did not contain the words "knowingly and wilfully". These words were incorporated in the Act by a Senate amendment.

From the debates in the Senate it appears that some of the Senators feared that the bill as passed by the House might result in injustice to a line of railroad which might

receive a shipment of cattle from another carrier which had already confined them a number of hours, without the receiving road being advised of that fact, and this lack of knowledge might result in the receiving road violating the Act. After a lengthy debate on the subject of knowledge which the receiving road might have and which would be available to it, the following proceedings are set forth on Page 4235 of Vol. 104 of the Congressional Globe, Part 5, 42nd Congress, First Session:

> "Mr. Casserly. I wish to offer an amendment to insert on line 28, page 2, after the word 'shall', the words 'knowingly and wilfully;' so that a company which receives animals that have already been 28 hours without rest, water, and feeding, shall not be liable except the scienter is proved; in other words, except it is shown that the company knew the fact.
>
> "Mr. Frelinghuysen. That is wholly unnecessary; that is the law now."
>
> The amendment was adopted.

It is to be noted that in the debate in the Senate and where the amendment was introduced, not one word was ever said about "wilfullness". All that the Senators had concerned themselves with in the debate, and all that Senator Casserly sought to cover in his amendment was "scienter"; that no carrier should be penalized for confining cattle too long "except it is shown that the company *knew the fact*". This result could have been accomplished by inserting in the act the word "knowingly" alone; for this purpose it was unnecessary to insert "wilfully". Therefore, neither the debate in Congress nor the history of the legis-

lation explain why the word "wilfully" was inserted in the act.

The Government does not draw any distinction between the words "knowingly and wilfully", though it is quite apparent that, as remarked by the Court in *St. Louis & S. F. R. Co. v. United States, (8th C. C. A.), 169 Fed. 69:*

> " 'Wilfully' means something not expressed by 'knowingly' else both would not be used conjunctively."

That the word "wilfully" means something not expressed by "knowingly" amply appears from the definitions hereinabove set forth.

Neither the history of the legislation nor the debate in the Senate on the adoption of the original Cruelty to Animals Act of 1873 sheds any light on the inclusion of the word "wilfully" in that act.

III.

The preponderant authority is to the effect that a carrier is not liable for a penalty under Section 3 of the Cruelty to Animals Act, where the statutory period of confinement is exceeded by reason of an act occurring through the negligence or oversight of the carrier's employee.

As Judge Hutcheson stated in his opinion in this case, (R. 55), *90 F. (2d) 213, 215:*

> "There is some difference of opinion in the authorities as to the meaning and intent of the act. A few

decisions (citations omitted) have taken the view of it the United States urges upon us. The current of authority, however, runs strongly the other way. (Citations omitted). This is in accordance with the general rule that the word 'wilfully' when used in statutes of this kind, has the well-defined meaning of deliberate and conscious purpose. It gives effect to the view that statutes in which it is found subject to penalty or punishment only those who deliberately and consciously, that is, with set purpose, do what they are forbidden by the statutes to do. Under that view such statutes do not subject to penalties those who, though they violate them, do so unintentionally through oversight, or simple negligence."

We submit that the weight of the jurisprudence in the First, Third, Sixth, Seventh, Eighth and Ninth Circuit Courts of Appeal is to the effect that in a suit by the United States for a penalty for violating the Cruelty to Animals Act, it is incumbent upon the United States to make some showing of knowledge and wilfulness, and cite in support thereof the following cases:

First Circuit.

United States v. Boston & M. R. R., (C. C. A. 1936), 84 F. (2d) 365.

Third Circuit.

United States v. Lehigh Valley R. Co., (C. C. A. 1913), 204 Fed. 705;

United States v. Philadelphia & R. Ry. Co., (D. C. E. D. Pa. 1915), 223 Fed. 214.

Sixth Circuit.

United States v. Southern Ry. Co., (D. C. E. D. Tenn. N. D. 1923), 1 F. (2d) 607.

Seventh Circuit.

St. Louis Merchants' Bridge Terminal Ry. Co. v. United States, (C. C. A. 1913), 209 Fed. 600.

Eighth Circuit.

United States v. Union Pacific Ry. Co., (C. C. A. 1909), 169 Fed. 65;

St. Louis & S. F. R. Co. v. United States, (C. C. A. 1909), 169 Fed. 69;

United States v. Stockyards Terminal Ry. Co. (C. C. A. 1910), 178 Fed. 19;

St. Joseph Stockyards Co. v. United States, (C. C. A. 1911), 187 Fed. 104; and

United States v. Sioux City Stock Yards Co., (C. C. N. D. Iowa W. D. 1908), 162 Fed. 556.

Ninth Circuit.

Oregon-Washington R. & Nav. Co. v. U. S. (C. C. A. 1913), 205 Fed. 337.

Conclusion.

In conclusion, we submit that there is presented here only a question of fact, which has been determined by the Judge of the District Court and is not reviewable here, and that there is not here presented any question of law for this Court to review. In the alternative, we submit

that all the legal questions involved have been properly decided by the District Court and the Fifth Circuit Court of Appeals, and that their judgments are correct and should be affirmed.

Respectfully submitted,

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New Orleans, Louisiana,
Jan. 7, 1938.

SUPREME COURT OF THE UNITED STATES.

No. 352.—October Term, 1937.

The United States of America, Petitioner, vs. Illinois Central Railroad Company, a Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 28, 1938.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner brought this suit in the federal court for eastern Louisiana to recover from respondent a penalty for violation of the Act of June 29, 1906, 34 Stat. 607, 45 U. S. C. §§ 71-74. Upon an agreed statement, the court found the facts, stated its conclusions of law and gave judgment for respondent. The circuit court of appeals affirmed. 90 F. (2d) 213. This Court granted a writ of certiorari. 302 U. S. —.

The question for decision is whether, as a matter of law, the facts found show conclusively that respondent knowingly and willfully failed to comply with the requirements of the first section of the Act.

It declares that no carrier whose road forms a part of a line over which cattle shall be conveyed from one State to another shall confine the same in cars for longer than 28 consecutive hours without unloading them into properly equipped pens for rest, water and feeding unless prevented by storm or by other accidental and unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight; upon the written request of the owner the time of confinement may be extended to 36 hours. Section 2 requires that animals so unloaded shall be properly fed and watered. Section 3 provides: "Any railroad . . . who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than

$100 nor more than $500 . . . " recoverable by civil action in the name of the United States. § 4.

The petition alleged that respondent knowingly and willfully confined cattle in a car for 37 hours without unloading them. The answer admitted that the cattle were continuously confined in the car from three o'clock in the afternoon of October 8, 1932, when loaded at point of shipment, Hermanville, Mississippi, until four o'clock of the morning of October 10 when unloaded at destination, New Orleans, Louisiana, but directly put in issue the allegation that respondent knowingly and willfully so confined the cattle. It alleged that the car arrived at New Orleans at 11:35 in the evening of October 9; that having received advance information of the approximate time of arrival and of the time when the 36-hour period would expire, respondent's yardmaster, in order promptly to handle the shipment, procured an extra engine and crew immediately upon arrival of the car to take it to the stockyards and, before the expiration of the permissible time of confinement, there place it for unloading; that the yardmaster negligently failed to notify the employee, whose duty it was to unload; and because of his oversight and negligence the cattle were continuously confined in the car for 37 hours.

A motion by petitioner for judgment on the pleadings having been overruled, the parties waived trial by jury and stipulated evidentiary facts in substance as alleged in the answer. They left open the question whether respondent knowingly and willfully confined the cattle for more than 36 hours. The case was submitted for decision on the agreed statement without more. The court found evidentiary facts in accordance with the stipulation, held failure to unload within the time was due to the negligence of the yardmaster, and concluded that respondent did not knowingly and willfully fail to comply with the statute.

The case depends upon the meaning of the phrase "knowingly and willfully", used in § 3 to characterize the transgressions for which penalties are imposed. The Act is to be construed to give effect to its humanitarian provisions, and as well to the exceptions in favor of the carriers. *Chicago & N. W. Ry. Co.* v. *United States*, 246 U. S. 512, 517-518. The penalty is not imposed for unwitting failure to comply with the statute. *United States* v. *Sioux City Stock Yards Co.*, 162 Fed. 556, 562. *United States* v. *Stockyards*

Terminal Ry. Co., 178 Fed. 19, 23. *St. Joseph Stockyards Co.* v. *United States*, 187 Fed. 104; *Oregon-Washington R. & Nav. Co.* v. *United States*, 205 Fed. 341, 343. But in this case, the respondent knew when the permissible period of confinement would expire, brought the car to destination, and, within the time allowed, placed it for unloading. By allowing the 36 hours to expire, it "knowingly" failed to comply with the statute.

Mere omission with knowledge of the facts is not enough. The penalty may not be recovered unless the carrier is also shown "willfully" to have failed. In statutes denouncing offenses involving turpitude, "willfully" is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States* v. *Murdock*, 290 U. S. 389, 394, shows that it often denotes that which is "intentional, or knowing, or voluntary, as distinguished from accidental", and that it is employed to characterize "conduct marked by careless disregard whether or not one has the right so to act". The significance of the word "willfully" as used in § 3 now before us, was carefully considered by the circuit court of appeals for the eighth circuit in *St. Louis & S. F. R. Co.* v. *United States*, 169 Fed. 69. Speaking through Circuit Judge Van Devanter, now Mr. Justice Van Devanter, the court said (p. 71): "'Willfully' means something not expressed by 'knowingly', else both would not be used conjunctively. . . . But it does not mean with intent to injure the cattle or to inflict loss upon their owner because such intent on the part of a carrier is hardly within the pale of actual experience or reasonable supposition. . . . So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." That statement has been found a useful guide to the meaning of the word "willfully" and to its right application in suits for penalties under § 3. *United States* v. *Stockyards Terminal Ry. Co.*, *supra*, 23. *St. Joseph Stockyards Co.* v. *United States*, *supra*, 105. *Oregon-Washington R. & Nav. Co.* v. *United States*, 205 Fed. 337, 339. *St. Louis Merchants' Bridge T. Ry. Co.* v. *United States*, 209 Fed. 600. See also *Chicago, B. & Q. R. Co.* v. *United States*, 194 Fed.

342, 346. *United States* v. *Kansas City Southern Ry. Co.*, 202 Fed. 828, 833.

Considered as unaffected by the yardmaster's negligence, respondent's failure to take the cattle from the car already placed at the yard for unloading, unquestionably discloses disregard of the statute and indifference to its requirements and compels the conclusion that, within the meaning of § 3, respondent willfully violated its duty to unload as required by § 1. It is immaterial whether the yardmaster's negligence or oversight was intentional or excusable. As between the government and respondent, the latter's breach is precisely the same in kind and degree as it would have been if its yardmaster's failure had been intentional instead of merely negligent. The duty violated did not arise out of the relation of employer and employee but was one that, in virtue of the statute, was owed by respondent to the shippers and the public. As respondent could act only through employees, it is responsible for their failure. To hold carriers not liable for penalties where the violations of §§ 1 and 2 are due to mere indifference, inadvertence or negligence of employees would defeat the purpose of § 3. Whether respondent knowingly and willfully failed is to be determined by the acts and omissions which characterize its violation of the statute and not upon any breach of duty owed to it by its employees. Respondent's contention that it is not liable because its failure was due to the negligence or oversight of the yardmaster cannot be sustained. *Montana Cent. Ry. Co.* v. *United States*, 164 Fed. 400, 403. *United States* v. *Atlantic Coast Line R. Co.*, 173, Fed. 764, 769. Cf. *Oregon-Washington R. & Nav. Co.* v. *United States*, 205 Fed. 337, 340.

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.